JD(NY)-07-10
North Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FIRST TRANSIT, INC.

and Case No. 28-CA-22431

EBONY GOINES, An Individual

and Case No. 28-CA-22471

TIFFANY CROFFORD, An Individual

Joel C. Schochet, Esq., of Las Vegas, Nevada
for the General Counsel
Shirlyce M. Ammons, Esq., San Antonio, Texas
for the Respondent

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Ebony Goines (Goines) in Case No. 28-CA-22431 and charges filed by Tiffany Crofford (Crofford) in No. 28-CA-22471, the Director for Region 28 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on May 27, 2009[1] alleging that First Transit, Inc. (Respondent or First Transit) violated Sections 8(a)(1) and (3) of the Act.

The trial with respect to the allegations in said complaint was held before me in Las Vegas, Nevada on July 14 and 15.[2] Briefs have been filed and have been carefully considered.

Based upon the entire record, including my observations of the demeanor of the witnesses, I issue the following:

FINDINGS OF FACTS

I. Jurisdiction and Labor Organization

Respondent is a Delaware Corporation, with an office and place of business in North Las Vegas, Nevada (herein called Respondent's facility), where it is engaged in the operation of providing transportation and shuttle bus service to the public.

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[1] All dates hereinafter referred to are in 2009, unless otherwise indicated.

[2] Respondent filed an amended answer on July 14 at the start of the trial, which was received without objection from General Counsel.

During the 12-month period ending April 2, 2009, the Respondent derived gross revenues in excess of $250,000, and purchased and received at its facility, goods valued in excess of $50,000 directly from points outside the state of Nevada.

Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of Sections 2(2)(6) and (7) of the Act.

It is also admitted, and I so find, that Teamsters, Chauffeurs, Warehousemen and Helpers Local 631, affiliated with International Brotherhood of Teamsters (herein called the Union or Local 631) has been a labor organization within the meaning of Sections 2(5) of the Act.

II. Respondent's Operation

Respondent provides "dial-a-ride" bus service for senior and disabled citizens as a contractor for the Regional Transpiration Commission of Southern Nevada (RTC). Respondent began providing these services in July 2007.

At the North Las Vegas facility, Respondent employed approximately 460 drivers, 18 dispatchers and 7 customer service representatives (CSRs), as well as utility fuel mechanics, salaried personnel including schedulers, plus a number of supervisors and managers.

Valerie Flores is the General Manager and is in charge of the facility. Other admitted supervisors and agents at the facility were Leilani Longo (Quality Assurance Manager) and Kevin Snyder (Assistant General Manager).

Kathy Kumar and Juan Alicea were employed by Respondent at the facility as schedulers.[3]

Respondent's drivers and the utility mechanics have been represented by Local 1637, Amalgamated Transit Workers Union (ATU) and the dispatchers have been represented by Local 631.

Prior to Respondent obtaining the contract, RTC performed the CSR functions in house with its own employees. When Respondent was awarded the contract, RTC decided to move the CSR function to Respondent to eliminate unnecessary delays in handling day of service customer issues and to provide proactive problem resolution through the ability of the CSR staff to work directly with the radio dispatch staff.

The CSRs handle scheduling and cancelling of appointments as well as complaints and inquires from clients[4] and/or their relatives.

The CSRs are required to answer the phone as a representative of the RTC and to give their first name. One of the issues frequently encountered by the CSR involves a complaint from a client or a relative of a client that a ride has been missed. Often, the reason for this is that the

[3] The complaint alleges Kumar and Alicea to be supervisors and agents of Respondent, which is denied by Respondent in its amended answer.

[4] Although technically the RTC is the "client" of Respondent, the public, who uses the services of the RTC performed by Respondent, are referred to as the "clients."

bus was at the place of pick-up but the client was not. In such situations, the RTC policy is that the driver will wait for five minutes and then go on to his or her next stop. When that occurs, the client is considered a "no show." The RTC penalizes clients for "no shows" and points are assessed against the client's record. A sufficient number of points can result in the termination of the client's rights to use the RTC's services.

The primary responsibility of the CSR is to "be an advocate" for the clients.

III. Respondent's Freedom of Association Policy

In November 2007, First Group of America, the parent company of Respondent, instituted a Freedom of Association Policy (FOA) for all of its subsidiaries, including Respondent. This policy essentially requires Respondent's management to be neutral during union organizing campaigns and not to influence employees in employees' choice to join or not to join a union.

More specifically, the policy reads as follows:

> Objective: To manage our business in support of our employees and the above rights and to refrain from management conduct, whether written or verbal, which is intended to influence an employee's view or choice with regard to labor union representation. In particular, during union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management.
>
> Policy Statement: Management shall not act in any way which is or could reasonably be perceived to be anti-union. This includes refraining from making derisive comments about unions, publishing or posting pamphlets, fliers, letters, posters or any other communication which should be interpreted as criticism of the union or advises employees to vote "no" against the union.

The policy also provides for a mechanism to enforce the policy called a compliance monitoring program. This program names an independent monitor[5] to enforce the program, who has the power to investigate complaints filed by employees or union representatives alleging violations of the FOA policy, and to issue reports to First Group with recommendations for remedying if any violations are found. The monitor also is responsible for providing independent observers to be on-site during the secret ballot elections to observe if FOA policy is being followed. These employees are empowered to interview employees confidentially and prepare a report for First Group.

If a manager or supervisor violates the FOA Policy, he or she is subject to termination.

IV. The Union Campaign

As I have noted above, Respondent's drivers and mechanics were represented by Local

[5] The independent monitor named is William Gould IV, the former Chairman of the Board.

631. Respondent's seven CSRs were not represented by a union.[6]

Sometime in November or December 2008, Crofford, who had previously received several write-ups from management, complained about the write-ups to the dispatcher shop stewards, Rosalind Pace and Tammy Lyons. Pace and Lyons told Crofford that she should join the Union. They also informed Crofford that they were trying to get the CSRs into the Union. Crofford replied "Yeah, that would be really cool."

In mid-December, Todd Clapper, a business agent for Local 631, came to the facility and spoke to several CSRs including Goines, Sandra Williams, Matthew Creech and Angelica Aunario. Clapper asked the group if they were interested in joining the Union and added that he would try to see if the Union could cover the CSRs. None of the CSRs made any response to Clapper's inquiries. Clapper said nothing at the time about signing cards or about the process for joining the Union or for the "covering" the CSRs.

In early January, Clapper made several other visits to the facility and made similar comments to the CSRs present. Again, no CSRs responded.

However, in January, the above named CSRs plus Crofford[7] discussed among themselves Clapper's visits and statements, and all five CSRs expressed interest in joining the Union.

During one of Clapper's January visits to the facility, he gave Williams a copy of the union book and pin, which was shown to the other CSRs.

In later January 2009, the dispatcher stewards, Pace and Lyons met with Crofford, Williams, Creech and Aunario.[8] They asked the CSRs what the interest was in joining the Union. The CSRs present responded that they each were interested, and Crofford stated that Goines was interested as well. Lyons and Pace suggested, and the CSRs agreed, that they should not tell fellow CSR Deanna Zapata about the Union because she was friends with Mike Rosson, a supervisor, and Sarah Buchner, as well, because she is friendly with Longo and Kumar. Thus, the employees and the stewards agreed not to discuss the Union with or in the presence of Zapata or Buchner.

In mid-February, Pace approached Williams, Crofford, Creech and Aunario separately at the facility and gave them authorization cards to sign. Each employee signed the cards and returned them to Pace.

Also, in mid-February, Pace telephoned Goines, who was on maternity leave at the time. Pace informed Goines that other employees had signed union authorization cards, and asked Goines to come into the facility to sign a card. Goines agreed. Goines came to the facility the next day, signed the union card and returned it to Pace.

Buchner and Zapata were not asked to sign union cards pursuant to the above described agreement between the dispatcher stewards and the CSRs.

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[6] As also related above, the CSRs had previously been employed directly by the RTC as opposed to the drivers and dispatchers, who were employed by the previous contractor.

[7] Crofford was not present when Clapper came to the facility in December and January.

[8] Goines was on maternity leave at the time.

Both Crofford and Goines admit that there were no supervisors present when they signed their cards, or when they discussed the union among themselves. They further admit that the CSRs attempted to conceal their union talk and card signing from supervisors, as well as from Buchner and Zapata, and that in fact most of the union discussions and card signings occurred when supervisors were not even present at the facility.

On February 26, Clapper, Lyons and Pace met with Flores. After discussing several of the dispatcher issues, Clapper told Flores that Local 631 was interested in bringing the CSRs into the Union. Flores responded that the company has a freedom of association policy, and its employees have the right to organize the union. Flores added that she will let Respondent's attorney know what Clapper said to her. Clapper answered "Great." He would have its attorney draw up an amendment to the contract. Flores replied that it doesn't work that way – there is a process. She repeated her earlier statement that she would notify Respondent's attorney of Clapper's request. The discussion ended.[9]

Flores testified that she did not tell Longo or any other management official about her conversation with Clapper. She did however notify Respondent's attorney about the discussion. Longo corroborated Flores' testimony in this regard, and testified that Flores did not inform her about the conversation with Clapper or that the Union had demanded recognition for the CSRs. According to Longo, her first knowledge of any union activity was when she was informed that the Union filed a petition to represent the CSRs in April.

Both Flores and Longo deny any knowledge of which employees, if any, signed cards for the Union or which employees supported the Union.

On April 9, Local 631 filed a petition to represent the CSRs. An election agreement was entered into on April 15, and the Union won the election held on May 1. The Union was thereafter certified as the collective bargaining representative of the CSRs.

In conformance with its FOA policy, Respondent did no campaigning during the election period. It held no meetings, sent out no literature and made no attempts to tell employees whether or not they should vote for or against the Union.

V. The Alleged Violations of Section 8(a)(1) of the Act

A. Leilani Longo

Longo began supervising the CSRs in January 2009. Prior to that date, Mike Rosson had been the previous supervisor of this group of employees.

Shortly after Longo became the supervisor, she came into the call center after having posted a notice concerning signing up for overtime, days off and vacation. Present were Crofford, Buchner, Creech and Adriane Gardner, a dispatcher for Respondent. Crofford asked Longo if she would be following seniority in connection with these matters since Rosson had done so when he was in charge.

Longo responded that she is not Mike Rosson, the CSRs do not have a union and seniority would not be followed. Longo added, "Thank God you guys are not union." Gardner, a

[9] Clapper said nothing to Flores about the authorization cards. Nor did he assert to her that the Union represented a majority of the CSRs at the time.

dispatcher represented by the Union, who was present in the room, but not part of the meeting, heard Longo's comment. Gardner asked Longo, "What do you mean by that?" Longo did not respond to Gardner's inquiry.[10]

On March 30, Longo posted a document entitled "Emergency Schedule." Goines' name was not on the schedule. Shortly before that day, Goines was asked by Longo about a particular call that she had handled. Goines mentioned this to several of her co-workers, including Williams, Crofford and Gardner.

Therefore, when the employees saw that Goines' name was not on the schedule, they feared that Goines might have been terminated based on that call. Further, Longo was interviewing applicants for jobs on that day, further indicating to employees that Goines was going to be fired.

Therefore, Crofford, Williams, Gardner and Creech separately telephoned Goines, and let her know that her name was not on the schedule. They also informed Goines that Longo was interviewing applicants, and had also told employees that Respondent needed an extra person.

Longo had texted Goines on that same day (March 30) to inform her that she should come to see Longo prior to the start of her shift the next workday, March 31. Goines, who was off on March 30, texted back to Longo informing her that she (Goines) had heard that she was not on the schedule and if she (Longo) needed to talk to Goines, she (Goines) could come in that day. Longo did not respond to Goines' text. Nonetheless, Goines went to the facility on March 30 to try to see Longo, but Longo was unavailable due to the fact that she was interviewing applicants. Goines therefore left the facility and returned to speak to Longo on March 31 as instructed.

Meanwhile, Longo admits that she was "upset" when she found out that Goines had been told that she was not on the schedule. Longo then entered the call center. Present were Crofford, Williams and Creech. Longo raised her voice and asked the employees who had called Goines to let her know that she is not on the schedule or not working? None of the employees responded. Longo add, "It is very disappointing to me that if I post something that you assume right away that it affects your other co-workers. It is not your responsibility to inform any other employee if they are not on the schedule – that is my job." Longo also stated that she wanted to learn to trust the employees, and she can't do that when they were telling other employees different things. Once again, none of the employees made any response to Longo's statements. In this connection, Crofford testified, "None of us responded…we felt intimidated by what she said." Longo conceded that they (referring to the employees) "knew I was disappointed."

B. Kathy Kumar

[10] My findings with respect to the above conversation is based on the credited testimony of Crofford, corroborated by the testimony of Creech and Gardner. Although Longo denied making the statement "Thank God you guys are not union," I credit the testimony of the employees detailed above, particularly since Gardner and Creech are still employees of Respondent. Their testimony, where it is adverse to their employer is considered against their self-interest and therefore more worthy of belief. *Evergreen America Co.*, 348 NLRB 178, 207 fns. 63, 65 and 66 (2006); *Myers Transportation*, 338 NLRB 958, 968 (2003); *Georgia Rug. Mill*, 131 NLRB 1304, 1305 fn.2 (1961), enfd. as modified 308 F.2nd.89 (5th Cir. 1962).

Kathy Kumar and Juan Alicea are both schedulers.[11] They both share an office with Longo, and their primary responsibilities are to take care of all the driver's time off requests. They review schedules for the next day for accuracy and move around schedules to make sure that they are efficient. The record does not reflect how they perform these functions or what judgment they exercise in that capacity. The routes for each driver are mapped out by the RTC. The record does not reflect any schedulers' involvement with the CSRs on a regular basis.

However, in mid-March, Longo went on vacation for a week and a half. At that time, Longo sent a memo to the CSRs that if they had any concerns, issues or problems while she was away to go see Kumar or Alicea. During this period of time, the CSRs submitted their bids for shifts to Alicea. Alicea received the bids and made up a schedule in conformance with the bid requests made by the employees. Alicea posted the schedule on the bulletin board.

Flores testified that the schedulers were salaried personnel but were not supervisors. Crofford testified that she did not consider either Kumar or Alicea to be supervisors of Respondent. During the time that Longo was on vacation, Crofford was asked in the call center by Julie Fisher, a dispatcher, "How the union is going?" Kumar was present when Fisher made this inquiry. Crofford was uncomfortable discussing the Union in Kumar's presence because Kumar shared an office with Longo. Therefore, she responded, "Not very well[12] and I don't want to talk about it." Fisher replied "Okay." Kumar stated that part-timers cannot be union. Fisher replied that this was not true because drivers, who are part-time, are in the Union. Kumar made no further response and the discussion ended.

VI. The Change of Status of Crofford, Williams and Aunario from Full-Time to Part-Time

As detailed above, during February 2009, five of the seven CSRs signed union authorization cards.[13] Additionally, the record establishes on several occasions during December 2008 and January and February 2009, employees were discussing joining the Union among themselves.

Moreover, on February 26, Clapper, on behalf of the Union, discussed with Flores bringing the CSRs into the Union and covering them under the union contract. Although the Union did have signed cards from a majority of CSRs at the time, he did not mention this to Flores nor offer to show her the cards. Indeed, Clapper did not specifically demand recognition, nor assert that the Union represented a majority of CSRs.

As of March 3, four of the CSRs were part-time (i.e. working approximately 30 hours a week). Three CSRs, Crofford, Williams and Aunario, were full-time employees, who worked 40 hours per week. Only the full-time employees were eligible for medical benefits.

On March 3, Longo issued a memo changing the status of Williams, Aunario and Crofford to part-time effective March 15. It reads as follows:

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[11] While the Complaint alleges and Respondent denies that both Kumar and Alicea were supervisors and agents of Respondent, the Complaint alleges conduct violative of the Act only by Kumar. Neither the record not General Counsel's brief reflects why the Complaint alleges Alicea to be a supervisor or agent of Respondent.

[12] I note that by that time, five CSRs had signed cards and Clapper had spoken to Flores about covering the CSRs under the union contract.

[13] The signers were Crofford, Goines, Williams, Creech and Aunario.

To: Angelica Aunario
Tiffany Crofford
Sandra Williams

From: Leilani Longo, Quality Assurance Manager

Date: March 3, 2009

Subject: Status Change

Currently, the Call Center handles at most 600 or less calls per day Monday through Friday. Based on call volume and the number of personnel currently allocated (seven) for the call center it is necessary to minimize the shifts without having to lay off employees. 600 / 5 = 120 calls per inquiry person working 5 or 6 hours per day. This scenario presents each call taker working effectively and efficiently without down time.

In an effort not to lay off employees the Company has elected to utilize all personnel as part-time status effective March 15, 2009 working at most 30 hours per week.

New part-time shifts have been posted and inquiry staff will bid the week of March 8, 2009. Bids must be turned into the scheduling department by 12:00 p.m. on Thursday, March 12, 2009.

The company will recognize your past earned full-time status and make available your 1 week (5 days) of paid vacation time effective 4/1/09.

Thank you for your understanding.

Longo and Flores both furnished testimony that Respondent had been instructed by officials from its parent company to reduce costs with respect to overtime and other areas due to the global recession and its affect on Respondent's business. Consequently, Flores held a meeting of Respondent's managers. Flores discussed Respondent's economic situation and the need to cut costs, and instructed each of the managers to try to think of ways to reduce costs.

Longo made several suggestions to Flores, including the changing of three CSRs to part-time employees. Longo made a cost analysis of this proposal, which resulted in savings of $30,000 per year based on primarily savings in benefits. Flores and Longo initially discussed laying-off some CSRs but decided that in this economy it would be unfair to lay people off, and agreed upon the change of status instead.

In addition to this cost cutting change, Respondent laid off 33 drivers and two supervisors.[14] These lay-offs occurred around the same time as the change of status of the three CSRs. Longo testified unequivocally that the fact that CSRs were attempting to unionize,

[14] The supervisors laid off were Rosson and Lamont Brever, an operations manager.

as of March 3, had nothing to do with the decision to change them from full-time to part-time.[15]

Goines went on maternity leave on January 25. Sheldon Horwich, a driver, was transferred into the CSR department and covered Goines' shifts. Goines returned to work from maternity leave on March 9. Horwich continued to work as a CSR, notwithstanding Goines' return.

Further, on March 20, Respondent advertised and interviewed for hiring new part-time CSRs. Longo testified concerning the above actions. According to Longo, Horwich was initially transferred to the CSR department to fill-in for Goines, but that she had been informed that Sarah Buchner would be quitting in early April. Thus, Horwich replaced Buckner.

Further, Respondent hired two more CSRs as of April 1, Jared ---- and Pomai ----. Longo explained that these two new hires were replacements for Goines and Deana Zapata, who were both terminated.[16]

VII. The Alleged Discrimination against Goines

A. The Warning

On January 21, Longo purchase Chinese food for all the CSRs present. After the food was delivered, Buchner's bag included a container of sweet and sour sauce. Goines noticed the sauce and said to Buchner, "You are the one, who has the sweet and sour sauce." Buchner conceded that she had the sauce but asserted that it was hers since the sauce was in her bag. Goines, supported by Gardner, who also was present, claimed that the sweet and sour sauce was for everyone. There is no dispute that Goines and Buchner argued about the sauce, causing Buchner to walk out and complain to Longo about Goines' conduct.

Goines, supported by the testimony of Gardner and Creech, asserts that she did not curse or use obscene language during this argument.

However, when Buchner complained to Longo about the confrontation, she accused Goines of cursing at her and of creating a "hostile working environment." Longo told Buchner that she could not do anything about it unless Buchner put her complaints in writing. Buchner agreed, and the next day submitted a seven-page document dated January 22. The document made several complaints about Goines, including and emphasizing the argument about the sweet and sour sauce. In the document, Buchner asserted that Goines said to her in the course of their argument the following. "I don't know who the fuck you're talking to – I don't think you know who the fuck you're talking to, but you ain't fucking talking to me like that, bitch." Buchner also states later on in her report that she considers her work "a hostile working environment," in view of her treatment by Goines.

Sandra Williams also complained to Longo on January 21 about the argument between Goines and Buchner over the sweet and sour sauce, and told Longo that it was difficult for her to work in an environment where her co-workers don't get along. Longo asked Williams to write

[15] Indeed, as noted above, Longo testified that she was unaware that the Union was organizing the CSRs on March 3. She also testified, corroborated by Flores, that Flores did not tell her about her conversation with Clapper on February 26.

[16] Goines was terminated on March 31. Zapata was terminated in late March or early April by Flores.

up her version of the incident. Williams was hesitant to do so, but Longo persisted and stated that "it was very important if there is a hostile work environment to another employee that I have to back this up." Longo added, "I would appreciate if you would write something up."

Williams did write-up her version of the incident and gave it to Longo on January 22. This document reflects the argument and essentially corroborates Buchner's assertion that Goines cursed at Buchner during the confrontation.[17]

After receiving these two documents, Longo testified that she decided to issue Goines a written warning. Thus, on January 24, Longo called Goines into her office. Longo informed Goines that she had received written complaints from several employees about Goines' conduct concerning the "sweet and sour incident." Longo told Goines that she would be receiving a written warning concerning her conduct. Longo read word-for-word the warning, which is set forth below:

> Notice Date: 1/24/09
> Employees Name: Goines, Ebony
> Violation Date: Wednesday, January 21, 2009
> Violation: Hostile Work Environment, Inappropriate Language and Behavior
>
> Details:
> When I first met with you one of my expectations were that I would not tolerate any type of unprofessional behavior in the call center department. I stated we needed to focus on the work and work as a team. In the presence of both my master schedulers you acknowledged you understood.
>
> On January 21, 2009 you created a hostile work environment, used and demonstrated inappropriate language and behavior. Your co-workers have validated this behavior in writing to me.
>
> Since I clearly stated my expectations to you as your new manager, I am issuing you along with this warning notice; a condition of employment: upon your return from maternity leave.
>
> Within the first 90 days of your return if I hear, witness or your co-workers continue to come to me and provide me with written collaborating stories regarding your unprofessional behavior in the workplace you will be terminated for gross disregard of policy. There is a zero tolerance when it affects the morale of your co-workers.
>
> Please make every effort to focus on the tasks and goals we have set in the call center.
>
> Supervisor: Leilani Longo

[17] Williams stated, "Ebony then just starts to curse at Sarah, saying things like she don't know who the fuck she thinks she is talking to."

After reading this document to Goines, Goines admitted that she had used "inappropriate language and behavior." Goines did not admit, nor was she specifically asked, whether she cursed as Buchner. Longo asked Goines to sign the document and if she wanted a copy. Goines refused to sign and did not want a copy.[18]

B. The Termination

As I have related above, Goines was called by several employees on March 30, and informed that her name was not on the schedule posted by Longo. She had also been informed that Longo wished to see her. Goines finally was able to meet with Longo on March 31. Present, in addition to Longo, were Kumar and Alicea. Longo began the meeting by informing Goines that it wasn't a good day for her, and that she was being terminated based on her conduct during a call earlier in the week. Longo played the tape of the conversation between Goines and Mrs. Meisner, who was the mother of a client, who was scheduled to be picked up. The tape revealed that Mrs. Meisner had complained about the fact that her son, a disabled individual, was scheduled to be picked up and brought back but had not arrived. Goines, after checking the computer informed Mrs. Meisner that her son was a "no show." Mrs. Meisner continued to insist that her son was not a "no show," and became upset and began to cry when Goines continued to inform her that the computer showed that a driver had arrived at the pick-up location and her son was not there. Eventually, the call ended.

Goines then spoke to Mel, the dispatcher and informed him that the mother had called and said that her son had not arrived and denied that he was a "no show." Mel informed Goines that he would send another bus to the same location to try to pick-up the son.[19]

Longo told Goines that she was being terminated because she did not show enough emotion and did not act as an advocate for the client during this call. Longo explained that the woman was going through anxiety, and asked Goines "How would you feel if it was your child?" Longo also informed Goines that she had been placed on final warning based on her January warning notice.

Goines responded that the January incident, which was the subject of the warning, had nothing to do with customer service. Goines also said that she would have expected a write-up or a suspension, but felt that it was unfair to terminate her for a first incident of problems with a call. Longo answered that Goines did "only the basics" of her job, did not show enough emotion and was not an advocate for the client. Therefore, Goines was being terminated. Longo added that if she (Longo) goes through recordings that she (Goines) would not be the only one terminated, and specially mentioned Tiffany Crofford had already been through two disciplinary customer service meetings.

Longo, during the course of the meeting, read to Goines a copy of the discharge notice. She asked Goines to sign it. Goines refused to do so. Longo gave Goines a copy of it and the

[18] I credit Longo's version of this conversation, as well as concerning the document itself. Goines' testimony that there was another document entitled "verbal warning" is rejected. I note that Longo wrote on the warning notice that "Ebony admitted to behavior, handled the warning well and did not want a copy."

[19] The next day, Goines found out that the police had been called after she left. The father had called and spoken to Mel, and there was a discussion between Mel and the father, which became heated. Goines also found out that the son had eventually arrived home using public transportation.

meeting ended. The notice reads as follows:

> Notice Date: 3/25/2009
> Employee Name Goines, Ebony
> Violation Date: Friday, March 20, 2009
> Violation: Of providing Customer Service and applying Job duties
>
> Details:
> Based on phone recordings with Mitchell Meisner's mother you neglected to provide customer service assistance or offer any help in determining what happened to her son whom she knew was lost for 2 hours.
>
> You failed to utilize the skills, tools and show compassion to alleviate the Mother's anxiety and made no special efforts for resolve.
>
> As an inquiry representative you were trained by RTC through an in depth Customer Service program and have acquired the knowledge you need to be an advocate of our passenger's.
>
> In January you received a last and final notice of your behavior and performance and have failed to abide by the 90 day return to work order.
>
> Because of this we are terminating you with First Transit Services.

Longo furnished extensive testimony concerning the decision to terminate Goines, as well as testimony concerning the situation when she began supervising the CSRs. Thus, as related above, RTC had been performing the CSR functions in-house prior to Respondent obtaining their contract, which included CSR functions in the summer of 2007. However, when Longo was assigned the task of directly supervising the CSRs in January 2009, she was made aware by virtue of several conversations with RTC officials[20] that they were not happy with how the CSRs were performing. Longo's testimony in this regard is corroborated by a letter from Sandra Stanko, Director of Transit Services for the RTC to Nick Promponas, Senior Vice President for Respondent dated April 9. The letter referred to a meeting on that date of the RTC Governing Board, where customers registered complaints about "insensitive treatment" by both drivers and CSRs employed by Respondent. The letter also refers to the history of complaints from the initial start-up in July 2007. The letter reads in pertinent part:

> From the initial start-up in July 2007, RTC has expressed concern regarding the training of persons hired in this function and the way in which First Transit staff respond to customers. Our staff has provided initial and follow-up training to First Transit personnel. Our Customer Service Manager and Supervisor have met with First Transit operations management on several occasions to try

[20] These individuals were RTC officials Kenny Rodriguez, Sue Joseph and Cassandra Campbell.

> to provide assistance for improvement in this critical area, but RTC continues to find unacceptable levels of performance occurring when operational variations present problems for paratransit riders.
>
> The Governing Body heard today from a person with a walker about her trials in using the service and dealing with the Inquiry staff. She commented that there appears to be "a culture among staff that shows a distain towards riders."

The letter then goes on request that Respondent provide an "updated, detailed formal plan with timeline for the management, training and operations of the Inquiry function. The plan should outline how First Transit will prioritize sensitivity training of all persons who answer the telephone and provide effective interaction with the radio dispatch staff to resolve operational variations." The letter concluded with a request "for immediate improvement in the Inquiry unit, and for assurance that all staff, who demonstrates a lack of sensitivity, quickly receives appropriate counseling or discipline."

Therefore, when Longo became the supervisor of the CSRs, she was determined to alleviate these problems that the RTC was making about the CSRs' performance. She met with each of the CSRs separately, discussed the complaints made by RTC with them and informed them that they need to be advocates for the clients and that their happiness and issues are taken care of. Longo provided the employees with training materials and asked each of them to express whatever concerns about the job to her.

With respect to Goines' termination, Longo testified that she received an email from Sue Joseph of the RTC complaining about the events with respect to a missing passenger, referring to the Meisner call. Joseph asked Respondent to investigate the matter. Longo investigated and found out that the driver had gone to the wrong spot, so Mrs. Meisner was in fact correct that her son was not a "no show." Longo also listened to the tape of Goines' call and concluded that her performance in that call was unacceptable. According to Longo, Goines did not do enough to assist the client, and could have and should have checked further and found out that this client was never a "no show" before and that the error was made by the driver. She should then have informed Ms. Meisner that Respondent would be sending another bus to pick up her son. Longo also was disturbed by Goines' failure to show "emotion" during the call or express any sympathy to Mrs. Meisner, who was very upset due to her son not having arrived home on time. Longo testified further that Goines should have apologized to Mrs. Meisner for what happened to her son, said that Respondent was sorry for the failure to pick the son up (whether or not Respondent was at fault) and assure her that Respondent would go back and pick up her son. Indeed, in this connection, Goines conceded that during this call she was "not at my best." Goines admitted that she should have put Mrs. Meisner on hold, and found out what happened with the trip and that she could have "showed her sympathy." Goines further asserted, however, that she had never been told or instructed by Longo, Rosson or any supervisor that she needed to show "sympathy" while talking to clients, who were upset.

After Longo listened to the tape, she concluded that discharge of Goines was warranted but decided to discuss it with Flores. Longo told Flores that Respondent had received a complaint from RTC about the incident and she (Longo) did not like how Goines handled the call. Longo played the tape for Flores, and then informed Flores that she (Longo) would like to terminate Goines. Flores asked about prior discipline, and Longo replied that she had issued Goines a last and final 90-day warning as a condition of employment. Flores replied that since Goines had her 90-day condition, Longo could go ahead and terminate Goines. Flores and

Longo did not discuss the details of the "sweet and sour" incident, which precipitated the final warning, and Longo did not show Flores a copy of the final warning. However, according to Longo, she did inform Flores in January about the warning when it was issued, so Flores was familiar with the facts concerning the incident that precipitated the warning.

After notifying Goines of her termination, Longo telephoned Joseph and informed her that after an investigation, including listening to the tape, Longo concluded that Goines' behavior was unprofessional and that her services were terminated. Joseph responded, "Okay. Thank you. I appreciate you letting me know."

Longo admitted that Respondent utilized a progressive disciplinary policy. Prior to March 15, Longo asserted that Respondent followed progressive discipline that began with counseling and a written warning, a one-day suspension and then finally termination. Although Longo claimed that this policy was written down, the record does not include such a written policy. In fact, prior to Respondent instituting a manual on March 15, which included a detailed disciplinary policy, Respondent followed the manual used by Laidlaw Transit Services, the predecessor contractor for the RTC, which company was purchased by Respondent's parent company prior to Respondent taking over the operations in the summer of 2007. The Laidlaw manual, which was distributed to all of Respondent's employees, did not provide a detailed progressive disciplinary policy.

This manual provides a list of standards of conduct expected by employees, but adds that the list is not intended to be complete but it demonstrates "what behavior may result in corrective action or discharge. In arriving at a decision both the nature of the incident and the prior record of the employee will be considered." It then lists a number of transgressions "for which an employee may be immediately dismissed." There are numerous items listed including stealing, drug use, insubordination, falsification of records and other items, none of which are relevant to the conduct in question here.

The Laidlaw manual then adds the following provision. "The company retains the right to immediately terminate an employee for any type of misconduct, including the examples listed below, depending upon the nature of and circumstance of the incident and the employee's prior record. However, examples of other conduct that normally will result in a warning or a suspension include the following." The manual then lists numerous types of conduct, including "failure to work as directed" and "discourteous or inappropriate attitude or behavior to passengers, other employees or members of the public."

Longo, as noted, began supervising the CSRs in January 2009, replacing Rosson. Previously, Longo had worked at Laidlaw and became a supervisor at Respondent when Respondent took over in 2007. However, Longo, prior to her appointment as Quality Assurance Manager, never received any human resources training from Respondent, and no training with regard to how to hire or fire employees, how to discipline employees, how to handle an investigation of disciplinary matters or what kind of due process to give employees in such situations.

When Longo began supervising the CSRs in January 2009, it was scheduled to be a temporary assignment since Kevin Snyder had been hired to replace Rosson and to perform that function. However, since Snyder was new to Respondent's employment, Longo was assigned to temporarily supervise the CSRs while Snyder became familiar with the operation. In fact, as of early May, Longo was no longer in charge of supervising the CSRs and Snyder assumed that responsibility.

As I have detailed above, when Longo assumed the responsibility of supervising the CSRs, she met with each of them and discussed the job and her expectations. Longo also prepared and distributed to each employee a number of materials and documents entitled "Reference Guide Book of RTC & FT POLICIES AND GENERAL INFORMATION." It consists of a number of memoranda issued in prior years from RTC representatives concerning proper procedures to be followed in various circumstances. It also includes a number of "call center scripts," which sets forth common calls and suggested responses. Notably, the suggested responses are filled with instructions to CSRs to apologize to the caller for any inconvenience caused by the problem.

The materials provided by Longo to the employees include a document entitled "INQUIRY BY-LAWS." One of the by-laws defined is "provide outstanding customer service." It is detailed as follows: "Assist (have a smile in your voice), be empathetic, make good decisions, listen and follow RTC policies. RUDE OR IRRITATED TONES ARE UNACCEPTABLE."

As noted above, Respondent on March 15 issued its own personnel manual to employees. This manual included provisions dealing with discipline, which divided infractions into four classes. Class 4 infractions, which appear to cover the conduct of Goines as well as Crofford, include the following language, "Incompetence or failure to meet reasonable standards of efficiency or effectiveness." The manual includes a section entitled "Multiple Written Warnings or Suspensions." It reads as follows:

> Multiple Written Warnings or Suspensions
> The previous section relates to repeated occurrences of the same class of infractions. This section outlines appropriate discipline when an employee receives a multiple number of written warnings or suspensions for different classes of infractions.
>
> - Written Warning
>   - Third written warning with 12 months – An infraction that would result in a third written warning within 12 months will result in a suspension from work and a final written warning.
>
>   - Fourth written warning within 12 months – An infraction that would result in a fourth written warning within 12 months will be cause to discharge the employee.
>
> - Suspensions
>   - Second suspension – An employee receiving a second suspension within 12 months for different infractions will receive a final written warning stating that future suspensions, for any reason, will be cause to discharge the employee.
>
>   - Third suspension – A third suspension within 12 months for different infractions issued to an employee will be cause to discharge the employee.

The manual also states as follows: "Whenever an employee is subject to discipline the employee's work record, including violations occurring in the relevant time period is reviewed before determining penalty. Penalties for violations of multiple rules of the same class, occurring

during the same time period, will be addressed at the discretion of management." The manual then sets forth a chart of classes of infractions and the progression to be applied. For Class 4 infractions, it calls for written warnings for the first and second offense within 12 months, a suspension for the third offense within 12 month of the first offense, and finally a discharge after the fourth offense within 12 months of the first offense.

Longo testified that she attempted to apply the provisions of this progressive disciplinary system in her decision to discharge Goines. When asked why Goines did not receive a suspension rather than a discharge if Longo was applying Respondent's disciplinary policy, Longo replied that she had issued Goines a last and final warning based on her creating "hostile work environment" and that in her opinion, a suspension was not required.

VIII. The Termination of Crofford

On April 3, Flores issued a memo to all of Respondent's employees entitled "Fresh Start on Many Discipline Matters." It reads as follows:

> DATE April 3, 2009
> TO First Transit Employees – Las Vegas Paratransit
> FROM Valerie Flores, General Manager
> SUBJECT Fresh Start on Many Discipline Matters
>
> Employees at our location have now received the new Employee Handbook. It includes restatements of the Company policies, procedures and work rules that we hope will help all employees better understand First Transit's performance expectations.
>
> Effective April 4, 2009, First Transit will provide a fresh start to each employee who has violated a work rule that resulted in progressive discipline. That means such infraction or incident that occurred prior to April 4, 2009, will not be considered for future progressive discipline. There are some exceptions to the "fresh start" policy, and those exceptions include the most serious performance violations, namely:
>
> - Preventable accidents
> - Motor Vehicle Records/moving violations;
> - Class 1 violations (pages 60-64 of the Handbook that could have subjected the employee to discharge for the first offense, where the employee was not discharged;
> - "Last chance" agreements, or "final warnings" given to an employee; and,
> - Attendance points and discipline.
>
> I hope that employees who have had violations in the past that resulted in progressive discipline will take this opportunity to carefully review the new Employee Handbook and ask for clarification of anything stated in the Employee Handbook that they do not fully understand. Then, with the "fresh start" policy they can recommit to their job with First Transit, and continue to enjoy greater job security.
>
> I am available to answer any questions you might have, about the

"fresh start" policy or the Employee Handbook.

CC James Hayes, ATU Union Steward Local #1637

As related above, on April 9, the Union filed its petition to represent Respondent's CSRs. A stipulated Election Agreement was executed on April 15, providing for an election on May 1. As per its "Freedom of Association Policy," Respondent did no campaigning during the pre-election period. The Union won the election, was certified and was in the process of bargaining with Respondent at the time of the instant hearing.

On April 9, Sandra Stanko, Director of Transit Services, sent a letter to Nick Promponas, Senior Vice President for Respondent, in which she registered complaints about Respondent's service, both by its drivers and CSRs. The letter reads as follows:

April 9, 2009

Nick Promponas
Senior Vice President
First Transit, Inc.
7581 Willow Drive, Suite 103
Tempe, AZ 85283

RE: Customer Comments at the April 9, 2009 Regional Transportation Commission Meeting

Dear Mr. Promponas:

At the Regional Transportation Commission of Southern Nevada's (RTC) Governing Board meeting today, a paratransit customer spoke before the Board expressing her concern about insensitive treatment by First Transit employees, both drivers and telephone inquiry staff. The RTC is currently 22 months into its service provider contract with First Transit, and it is disconcerting to have public comments brought forward regarding improper customer treatment.

RTC's original goal in moving the Inquiry function to the contractor was to eliminate unnecessary delays in handling of service customer issues and to provide pro-active problem resolution through the ability of the Inquiry staff to work directly with the Radio Dispatch staff.

From the initial start-up in July 2007, RTC has expressed concern regarding the training of persons hired in this function and the way in which First Transit staff respond to customers. Our staff has provided initial and follow-up training to First Transit personnel. Our Customer Service Manager and Supervisor have met with First Transit operations management on several occasions to try to provide assistance for improvement in this critical area, but RTC continues to find unacceptable levels of performance occurring when operational variations present problems for paratransit riders.

The Governing Body heard today from a person with a walker about her trials in using the service and dealing with the Inquiry staff. She commented that there appears to be a "culture among staff that shows a distain (sic) towards the riders." She expressed her opinion that drivers are augmentative (sic), which is a comment we have heard before and discussed with your training staff. It is necessary at this juncture to move our concerns from the counseling arena into a more formal complaint.

In reviewing the original Request for Proposal, much of what was outlined no longer is relevant in the current operations design. Please provide Sue Joseph, the RTC Project Manager, with an updated, detailed formal plan with timeline for the management, training and operations of the Inquiry function. The plan should outline how First Transit will prioritize sensitivity training of all persons who answer the telephone and provide effective interaction with the radio dispatch staff to resolve operational variations. Unless otherwise discussed, please submit your plan by April 24, 2009.

While RTC appreciates the many fine individuals working at First Transit, we are asking for immediate improvement in the Inquiry unit, and for assurance that all staff who demonstrates a lack of sensitivity quickly receives appropriate counseling or discipline.

Sincerely,

SANDRA STANKO
DIRECTOR OF TRANSIT SERVICES

CC: Jacob Snow, RTC
Mark Wells, RTC
Susan Joseph, RTC
Lydia Bilynski, RTC
Valerie Flores, First Transit

On April 15, Longo notified Crofford to come to her office at 10:30 a.m. Longo informed Crofford that she was being terminated because of unacceptable customer service skills. Longo added that Crofford had been given ample opportunity to improve her skills, including two instances of attending RTC training services, and her performance has not improved. Longo then read to Crofford a discharge notice, which reads as follows:

Notice Date:	4/15/2009
Violation Date:	Friday, April 3, 2009
Employee Name:	Crofford, Tiffany
Violation:	of Providing Poor Customer Service

Details:
Through multiple requests for investigation from either Customer Service Comments or the RTC directly it is determined that you fail to provide exceptional Customer Service to our passengers.

> Based on the nature of the recordings you are unresponsive to the passenger's needs, confrontational in your presentation and on numerous occasions put your passenger's phone calls on speaker phone.
>
> FT has provided you with tools and resources (i.e. Training classes, reference books, management input) to be an exceptional Inquiry representative. You have signed and have stated you are aware of your job requirements but fail to execute that knowledge.
>
> FT and RTC are committed to providing exceptional customer service and does not and will not tolerate personnel who choose not to abide by their policies.
>
> In November 2008 you received progressive discipline with a 3-day suspension for poor Customer Service. Because it continues to happen the company regretfully is terminating your employment services.
>
> Supervisor: Leilani Longo

Longo also read to Crofford, the above described April 9 letter from RTC to Respondent, expressing RTCs dissatisfaction with call center performance as a whole.

Longo then informed Crofford that she had performed poorly in an April 3 call, and asked Crofford to listen to a tape of the call in question in order to get Crofford's "input" and to show Crofford that there was a basis for the discharge decision.

Crofford refused to listen to the tape, stating to Longo that since Longo had already made the decision to discharge her, there is no point in Crofford giving her "input" or listening to the tape.

Crofford did not make any other comments during the meeting, and did not dispute any of the statements made in her discharge letter.

Subsequent to the discharge, Longo prepared a document entitled "Termination Checklist," apparently for Respondent's files. The document reds as follows:

> TERMINATION CHECKLIST
> FOR ALL EMPLOYEES
>
> To expedite termination approvals – All General Managers (or appropriate designee) must send this information via e-mail or fax to the HRD prior to a decision to terminate and in an effort to expedite the approval for termination.
>
> All non-voluntary terminations are to be pre-approved by your Human Resources Director. All non-voluntary Union terminations will be forwarded by the HRD to the appropriate Counsel to review, discuss and for final approval.

Name of employee: Tiffany Crofford
Location Name/Number: Las Vegas 55842
Is this person covered by a Collective Bargaining Agreement: No
Employee Hire Date: 8/21/2007
Is employee actively working?: No
If no-last day worked:

Before Human Resources will contemplate any terminations involving any employee, the location manager will need to provide to your Human Resources Director (HRD) an e-mail with a conformation that certain information has been gathered on the employee and has been placed in their personnel file.

Before a termination will be considered the location manager must be able to respond "YES" to each question listed below:

1. Was there a clear rule in place governing the conduct (First Transit Employee Handbook, Safety Policies, and CBA, etc.)? Yes
2. If this is a Union employee have you reviewed the CBA? Not a Union Employee
3. Do you have written documentation of the employee's receipt of this rule? Yes in file
4. Do you have proof that the employee violated the rule (evidence in the form of: videos Drive Cam, accident reports, signed witness statement, etc.)? Multiple Phone Recordings
5. Was the Employee given due process (management interviewed the employee and provided an opportunity for them to present their version of explanation of the story/incident/accident report)? Yes
6. Have you enforced this work rule consistently and fairly, in other words has every employee who has violated the rule or committed the same infraction received the same discipline? Yes

Before a termination will be considered, the location manager must be able to show and respond "No" to the question below;

7. Are there any mitigating circumstances (claims or allegations made by the employee such as harassment, W/C, FMLA or other)? If yes, explain: No

Summary of termination:
Violation of Policy/CBA as described in Policy Number: 2.03 Passenger Interaction/First Transit Inquiry Rep (Call Center) job requirements (signed). Tiffany has been through the RTC's Customer Service Training twice and continues to be unresponsive to our passenger's needs, she invites confrontation and puts clients on speaker phone for all to hear.

Name of person requesting termination: Leilani Longo
Phone # 702-636-6790 x130

Longo was asked on cross-examination whether Longo falsified this form by stating that Crofford was given "due process" in accordance with question 5, inasmuch as Crofford was not provided an opportunity to present her version of the incident prior to the discharge decision. Longo conceded that she might have interpreted this section wrong, but explained that she felt that Crofford was given due process since Crofford had received prior warnings and a suspension before the final incident that justified termination in Longo's opinion.

The final incident, as noted above, was an April 3 phone call that Crofford handled involving a client named Quabner. Longo testified that she received a phone call from Cassandra Campbell, CSR supervisor from RTC. Campbell informed Longo that the RTC had received a call complaining about treatment by a CSR, and the CSR was not helping the client and not giving the client the assistance that the client was requesting. Campbell asked Longo to listen to the tape and investigate the CSR's performance.

Longo then proceeded to listen to the tape, and testified that she felt that Crofford's performance was unacceptable because she was "egging the client on" and making the client angry. According to Longo, Crofford was not an advocate for the client, she did not listen to what the client was telling her and was argumentative. Further, Crofford should not have instructed the client to call back, particularly since the client had stated that she could not leave her father. The actual tape recording, which was played at the hearing, reveals the following:

> MS. CROFFORD: RTC Customer Service. This is Tiffany. How can I help you?
>
> MS. QUABNER: This is Grace Quabner. Did you send CAT Bus to 500 Graham Way for the County Commissioner's office? The man didn't wait no time. He was already gone. I went to get something and the man took off already. Are you going to leave us here all night?
>
> MS. CROFFORD: Okay, Ma'am, you got to calm down, okay? So, what is the last name of the client?
>
> MS. QUABNER: Quabner. Do you [indiscernible] here all night?
>
> MS. CROFFORD: How do you spell that?
>
> MS. QUABNER: Q-u-a-b-n-e-r.
>
> MS. CROFFORD: Okay, Ma'am, where are you?
>
> MS. QUABNER: We are at 500 Graham Way, the County Tax Assessing Office.
>
> MS. CROFFORD: Are you at Graham Way or Grand Central Parkway?
>
> MS. QUABNER: That is where we at.
>
> MS. CROFFORD: At Grand Central Parkway?
>
> MS. QUABNER: The County Tax Assessing Office.

MS. CROFFORD: Ma'am, is that 500 Grand Central Parkway?

MS. QUABNER: Yes, Ma'am. You going to leave us here all night?

MS. CROFFORD: No--Ma'am, another driver already came. There [indiscernible] --

MS. QUABNER: I went to go get something and then by the time I got back where the CAT Transit Bus stop was, he was gone.

MS. CROFFORD: Yes, he left, because he can only wait a minimum of five minutes. Actually, he was there from 1:13 until 1:25, so he waited over thirteen minutes.

MS. QUABNER: I had to go pick up some papers. When I went to go get the papers and came back, the man was already gone. It is a long walk in this building.

MS. CROFFORD: When we tell you a pick-up time, you got to be there at the pick-up time or the driver who is running on time, won't be there and will no-show you like this.

MS. QUABNER: Most of the time, they don't be there on time for me and my father. Ma'am, the man got us here at--they was supposed to pick us at 9:58 this morning. The man got us here with the next driver already here, and then you guys holler about you guys be on time. Half of the time, you don't be on time.

MS. CROFFORD: Okay, well we have our clients --

MS. QUABNER: You going to have me out here all night? I will never get home, Ma'am?

MS. CROFFORD: Okay, we have our clients. I will try and send back another bus. You have to give us another call in twenty minutes for another bus, but just be out there. When you call back for your pick-up time, be out there five minutes before that pick-up time, until 25 minutes --

MS. QUABNER: I have to walk --

MS. CROFFORD: -- after that pick-up time.

MS. QUABNER: -- all that way--I have to walk almost six, seven, eight blocks down to another hallway to get to a phone. I have no cellular phone, so I have to walk all the way down and leave my father sitting out there. I have to walk all the way back just to get to the phone. How am I going to call you back in twenty minutes? Can't you just --

MS. CROFFORD: You don't have to --

MS. QUABNER: -- put me on hold and tell me?

MS. CROFFORD: No, Ma'am. You have to call us back. I cannot leave you on hold. This is an incoming call center. We are very busy and it takes twenty minutes for them to schedule a ride. It does take about twenty minutes for them to schedule a ride.

MS. QUABNER: So, I have to go all the way back--I have to walk almost about six or seven blocks, a mile back down there, and then walk all the way back up here. I have to leave my father there. I have to have somebody to watch him. I have a senior citizen with me, 82 years old.

MS. CROFFORD: Ma'am, the majority of our clients are senior citizens, Ma'am but it does take about twenty minutes to schedule the ride. Normally, we can't schedule another ride, so I am going to try to – let me put you on hold so I can put it in the system, but you would have to call us back in about twenty minutes.

Are you there, Ma'am?

MS. QUABNER: I am here.

MS. CROFFORD: You would have to call us back in about twenty minutes for them to schedule --to have time to schedule that ride.

MS. QUABNER: That means--do you know where I am at?

MS. CROFFORD: You are at 500 South Grand Central Parkway, and the pick-up and the drop-off is at the main entrance, next to the newspapers.

MS. QUABNER: But I have to walk so far to get to a phone.

MS. CROFFORD: Well, I do apologize about that Ma'am, but if you want to call back in about fifteen minutes, then you can do that, but I cannot give you that time for another fifteen minutes, about twenty minutes now, because I have to put it in the system, and then inform the dispatchers of the return ride, that you need another ride.

MS. QUABNER: I will never get home. You guys are just not going to pick us up, are you?

MS. CROFFORD: Ma'am, we tried picking you up. You were not --

MS. QUABNER: [Indiscernible]

MS. CROFFORD: -- outside when the driver came.

MS. QUABNER: You trying to punish me and my father because we got here--because the first drivers brought us here too late this morning, you told him he couldn't continue his ride, so you are punishing us so--

MS. CROFFORD: No, Ma'am.

MS. QUABNER: You are just punishing us. You are never going to give us no ride --

MS. CROFFORD: What I am going to do now, I am going to put your ride in the system--okay, this is what I am going to do…are you listening?

MS. QUABNER: [No response.]

MS. CROFFORD: Are you not listening?

MS. QUABNER: I am listening.

MS. CROFFORD: I need you to listen, Ma'am, okay? You need to listen clearly. I am going to put it in the system. I am going to let the driver--I am going to let the dispatchers know right now. I am going to then transfer you to the Comments Department, so you can put in the complaint, okay, and you can talk to a supervisor over there, and then when you are done talking to that supervisor, have her or him transfer you back over to me, and I will let you know the pick-up time, okay, so you can do all of this in one step, okay, so you don't have to leave the phone, okay? And by the time the supervisor transfers you back over here, we should have a time, okay?

Hello?

MS. QUABNER: I am here.

MS. CROFFORD: Are you listening to me, Ma'am? Are you understanding what I just said?

MS. QUABNER: Yeah, I understand that I am in the city of Las Vegas who don't give a damn about anybody --I am never going to go home. You are going to have me stuck here all night, no way home, no money, no --

MS. CROFFORD: Ma'am, are you listening to me? You have to listen to me. We are not leaving you stranded, okay? We have a [indiscernible] policy.

I have to get you off the phone so I can put this no-show return in the system, so I can let the dispatchers know. We are not going to leave you anywhere. We do not leave our clients stranded anywhere. We cannot do that, okay, so I am going to put it in the

system, but I want you to talk to a supervisor over at RTC and let her know what is going on, and I want you to tell her--I will tell her also for you to be transferred back over to me, so I can let you know. It takes about fifteen minutes for them to schedule this ride, okay? I cannot let you know that time right now. I do not have that time.

How the dispatchers schedule the time is they put the time in the system, and then they see if a driver is in your area that can pick you up right away, okay, and then they work with that, okay?

MS. QUABNER: All right.

MS. CROFFORD: Okay, hold on one sec.

STATIC.
(Tape stopped.)

Longo testified, what in her view, were the problems with Crofford's performance during the call. Longo asserts that in her opinion, Crofford was not an advocate for the client, and was not listening to what the client was telling her and was argumentative. Further, Longo asserts that she has consistently informed the CSRs that there is no need to tell the client to call back. It takes only a few seconds to create and book a trip, and according to Longo, Crofford should have put the client on hold, arranged for a new pick-up and informed the client of when the pick-up would occur. Crofford also should not have suggested that the client complain to Comments Department, which is also improper, according to Longo.

After listening to this call, Longo then listened to several other tapes of calls handled by Crofford, two of which were included in the record. Longo testified that Crofford performed improperly during these calls by not following proper protocol and not assisting the client and failing to determine that the client had been improperly "no showed." This could have resulted in the client being assessed points for a no-show when it was not the client's fault. Other errors in these calls, according to Longo, were Crofford's failure to identify herself in one call, and the fact that Crofford disconnected another client.

Longo then proceeded to look in Crofford's personnel file. There, she found that Crofford had several prior disciplinary actions in 2008, including a three-day suspension. On August 28, 2008, Crofford received a written warning by Rosson, characterized as a "first offense" for allegedly failing to assist a customer. The warning reflects that the client wanted information on what happens when a location is closed and the bus arrives. Instead of handling the call, Crofford immediately informed the client if she wanted to, she could go to the Comments Department.

Crofford received another written warning on September 5, 2008, for arriving late to work for seven days, also characterized as a first offense. On October 9, 2008, Rosson issued a third written warning also characterized as a first offense for using the internet for personal usage.

On November 13, 2008, Rosson suspended Crofford for three days with the following:

FIRST TRANSIT
Progressive Discipline Form

Nature of Violation: CUSTOMER SERVICE
Dispatcher Name: TIFFANY CROFFORD
Violation Date: 11/10/08
Issue Date: 11/13/08
Issued By: Michael Rosson

Third Offense – (Blue) Unpaid suspension of three (3) days – (11/18, 11/19, 11/20)

Details: Tiffany did not cxl the client's trips for 11/07/2008. The notes for the cancel was entered Tracker Notes. This created an invalid NS. Client entered a complaint addressing the NS and to have any points removed. In it is very important that information is documented correctly to prevent the clients from receiving invalid points.

Finally on February 23, 2009, Crofford received another written warning for tardiness.

Longo testified further that she also uncovered in Crofford's file seven complaints that were made about Crofford's conduct during various calls. The dates of these complaints ranged from October 1, 2008 through March 17, 2009. These documents reflect the complaints made, but no further information about the disposition of these matters. The complaints were investigated by Karlene Northam, the Customer Comment Specialist. Northam's job is to speak to the CSR and to handle these matters. Apparently, Northam did so with respect to warnings given to all of the complaints since Longo was not informed about any of them by Northam.[21]

After reviewing these items and listening to the tapes of Crofford's call described above, Longo testified that she concluded that the April 3 call involving Quabner was the "last straw" and that Crofford should be terminated.

Longo informed Flores of the call from Campbell of the RTC and told Flores that she (Longo) didn't think Crofford's performance was acceptable and that Crofford should be terminated. Flores listened to the tape and commented that she was aware that Crofford had prior customer service problems, and told Longo that if she felt "that is was necessary for you to do what you need to do, then go ahead and do it."

Longo conceded that the April 3 memo, entitled "A Fresh Start on Many Discipline Matters," was in effect at the time of Crofford's discharge. Longo testified further that this memo did not come up during her discussion with Flores about terminating Crofford.

According to Longo, she believed that she was in compliance with the memo because one of the exceptions to the "Fresh Start" is last chance agreements or final warnings given to an employee. Longo asserts that in her view, following Respondent's progressive disciplinary system, the three-day suspension immediately precedes discharge. Therefore, since Crofford had received a three-day suspension, she considered that suspension to be equivalent to a final warning.

After Crofford was terminated, Longo notified Campbell of Respondent's decision.

[21] Some of these complaints were made when Rosson was the supervisor of the CSRs. The record does not reflect whether Northam notified Rosson about any of these complaints.

Campbell replied, "Okay. Thank you for letting me know."

After the instant charges were filed, Longo informed Campbell that Crofford had filed charges with the NLRB and was seeking to get her job back.

On June 12, 2009,[22] Sue Joseph, Transit Manager Specialist for the RTC, sent a letter to Flores, instructing Respondent to remove Crofford from services that would have contact with RTC's customers due to Crofford's handling of the April 3 call. The letter is a follows:

> June 12, 2009
>
> Valerie Flores, General Manager
> Laidlaw Transit Services, Inc.
> 3214 Citizens Avenue
> North Las Vegas, NV 89030
>
> ENFORCEMENT OF CONTRACT SECTIONS 15(i)
>
> Dear Mrs. Flores:
>
> Section 15(g) of the Contract between the Regional Transportation Commission of Southern Nevada (RTC) and First Transit dated March 8, 2007 requires all project employees to "maintain a professional courteous manner with passengers, including answering to the best of their ability all passenger questions." Section 15(i) provides for the removal of a Contractor employee from service for, but not limited to, "excessive complaints due to the discourtesy, rudeness, use of profanity or any other act deemed unacceptable."
>
> The RTC has reviewed the communication of Tiffany Crowfford during the handling of an Inquiry call and interaction on April 3, 2009 and has determined that this customer contact was unprofessional, lacking in sensitivity to the customer's obvious distress, and not in accordance with the RTC training guidelines for Inquiry requests. As such, based on Section 15 (i), First Transit is instructed to remove Tiffany Crowfford from services that would have direct contract with RTC's customers.
>
> Sincerely,
>
> SUSAN S. JOSEPH
> TRANSIT MANAGER SPECIAL SERVICES
>
> SJ:pc
>
> CC: Mark Wells, Assistant General Manager
> Sandra Stanko, Director Transit Services

[22] Crofford filed her charge on April 17, 2009. The instant complaint alleging her discharge to be unlawful was issued on May 27.

Kenny Rodriguez, Manager Customer Service
Lydia Bilynsky, Senior Purchasing & Contracts Analyst

IX. Analysis and Conclusion

A. The Alleged Interrogation

The complaint as amended alleges that on March 30 Respondent, by Longo, interrogated its employees about their concerted and union activities.

This allegation refers to Longo's conduct after she posted an "Emergency Schedule," which did not include Ebony Goines. Several employees, including Crofford, Williams, Gardner and Creech, suspected that Goines was going to be terminated based on this event, particularly since Longo was known to be interviewing prospective employees and the employees were aware that Goines had recently received a complaint about one of her calls. Therefore, the employees separately telephoned Goines to inform her that she was not on the posted schedule.

Subsequently, Goines texted Longo to inform her that she had "heard" that she was not on the schedule and offered to come see Longo on that day.

Longo admits that she was "upset" when she was informed that Goines was told that she was not on the schedule. Longo correctly concluded that her fellow CSRs had informed Goines about the schedule. Longo therefore entered the call center, raised her voice and asked the three employees present, who had called Goines to let her know that she was not on the schedule or not working? None of the three employees responded. Longo added, "It is very disappointing to me that if I post something that you assume right away that it affects your other co-workers. It is not your responsibility to inform any other employee if they are not on the schedule – that is my job." Longo also stated that she wanted to trust the employees and she can't do that when they are telling other employees different things. None of the employees responded once again. Crofford testified that "None of us responded. We felt intimidated by what she said." Finally, Longo conceded that the employees "knew I was disappointed."

General Counsel asserts that the employees were engaging in protected concerted activity by telephoning Goines and informing her of the schedule change, which might have meant she was terminated, and that Respondent, by Longo, coercively interrogated the employees concerning this concerted activity in violation of Section 8(a)(1) of the Act. *Campbell Electric Co.*, 340 NLRB 825, 836 (2003).

Respondent contends that the employees were not engaged in concerted activity since no group action was contemplated. It asserts that only Crofford had called on behalf of Goines and that was an individual act and not group action. However, I have found above that in fact several employees in addition to Crofford called Goines. The fact that there is no evidence that the employees discussed among themselves calling Goines is of no consequence. In fact, even if Crofford had been the only employee, who had called, as Respondent contends, this activity is still concerted.

In this regard, it is well settled that when one employee takes action on behalf of or in support of another employee in connection with their terms and condition of employment, this constitutes concerted activity. *The Continental Group*, 353 NLRB #31, ALJD *slip op* at 20 (2008) (employee who sought to persuade employer to reinstate another employee engaged in concerted activity); *Tracer Protection Services*, 328 NLRB 734, 741 (1999) (communication from

one employee to another in an attempt to protect the latter's employment constitutes protected concerted activity); *Buck Brown Contracting Co.*, 283 NLRB 488, 489 (1987) (attempt of one employee to assist another in procuring employment with employer is protected concerted activity); *The Loft*, 277 NLRB 1444, 1465 (1986) (one employee's complaint to employer about employer's handling of another employee's problem is concerted activity); *Intermountain Rural Electric*, 253 NLRB 1153, 1163 (1981), enfd. 732 F.2d 754, 763 (10th Cir. 1984) (one employee requesting that employer contact another employee on the radio for clarification of that employee's job status engaged in concerted activity); *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979) (letter of employee protesting discharge of another employee is concerted activity). See also *Ellison Media Company*, 344 NLRB 1112, 1113 (2005) (two employees discussing alleged sexual harassing conduct by supervisor engaged in protected concerted activity).

Having found that the employees engaged in protected concerted activity by calling Goines to notify her about her absence on the schedule, the issue becomes whether Longo's questioning employees about who had called Goines was coercive. I find the evidence clear that the interrogation was coercive and violative of Section 8(a)(1) of the Act. The employees, who made the calls, had not openly made known their concerted activity. Indeed, that is precisely why Longo asked them who had called. An important factor in assessing coerciveness of an interrogation is whether the employee questioned was an open and active union supporter. *Evergreen America Corp.*, 348 NLRB 178, 208 (2006); *Dyncorp.*, 343 NLRB 1147, 1210 (2004); *Demco New York*, 337 NLRB 850, 851 (2002).

While here concerted activities rather then union activities are involved, the same principles would apply. The lack of openness of the concerted activity supports a finding of coerciveness. Further, the questioning was accompanied by statements of hostility towards the concerted activity by Longo. Indeed, Longo concedes that employees knew that she was "disappointed" in their conduct and that she was upset about it. Further, Longo told employees of her disappointment with their conduct and stated that she can't trust employees if they engage in such conduct. Such statements of hostility towards the concerted activity, which accompanied the questioning, are another significant indication of coerciveness. *Evergreen America*, supra, 348 NLRB at 208; *Demco New York*, supra, 337 NLRB at 851; *Advance Waste Systems*, 306 NLRB 1070 (1992).

Finally, the employees declined to answer Longo's inquiries about who had called Goines. This silence further demonstrates the coerciveness of the interrogation. *Evergreen America*, supra at 208; *Medcare Associates*, 330 NLRB 935, 940-941 (2002); *Grass Valley Grocery*, 338 NLRB 877 fn. 1 (2003).

Accordingly, based on the foregoing analysis and authorities, I find that Respondent has violated Section 8(a)(1) of the Act.

B. The Alleged Threats by Longo

The complaint alleges that in or about January 2009, Respondent, by Longo, informed its employees that it would be futile for them to select the Union as their bargaining representative and threatened its employees with unspecified reprisals because they supported the Union and engaged in other union activities.

These allegations appear to refer to Longo's comment to employees, "Thank God you guys are not union," after employees had questioned her about why she did not follow seniority in connection with various issues as had the prior supervisor of the CSRs. Longo preceded the

above remark with a statement that she is not Rosson (the prior supervisor), the CSRs do not have a union and seniority would not be followed.

I see nothing in any of these comments by Longo that can even be remotely considered "informing employees that it would be futile for them to select the Union." Longo was merely informing employees correctly that they were not represented by a union nor under a union contract, and therefore she was not obligated to follow seniority even though her predecessor as supervisor did so. Interestingly, in General Counsel's brief, he does not even refer to this allegation and makes no argument nor cites any case in support of the allegation that Longo threatened employees with futility.

In any event, I find that the allegation has no merit. Longo makes no assertion, expressed or implied, as to what Respondent would do in the future in the event that employees choose to be represented by a union. Indeed at the time of this remark, there is no evidence that Longo was aware of any union activity by its CSRs.

Accordingly, I shall recommend dismissal of this complaint allegation.

General Counsel does argue in its brief that Longo did threaten its employees with unspecified reprisals because they supported the Union and engaged in other activities by her comment. *Hialeah Hospital*, 343 NLRB 391 (2004). General Counsel argues that Longo's statements about the Union were "the first time that Longo's feelings about the Union were made known" and were similar to the statements found unlawful in *Hialeah Hospital*, supra (employer told employees that he felt "betrayed" and "stabbed in the back" by unionization) I do not agree.

The comments made the employer in *Hialeah Hospital*, supra as well as in cases cited therein[23] were made in the context of the other unlawful statements made by the speakers involved and clearly conveyed the message that engaging in protected union activity was tantamount to employee disloyalty and implicitly threatened them with unspecified reprisals.

Longo's statement here cannot be so characterized. Notably, as I have observed above, there is no evidence that Longo was aware of any union activity at the time of her remarks. The context of her statement made it clear that she was not referring to any union activity or support of any employees, but explaining to the employees why she was not following seniority as did her predecessor as supervisor. She was not implicitly characterizing any union activity or indeed any future union activity by employees as disloyal.

While Longo did make the comment, "Thank God you guys are not union," I find that it merely represented Longo's opinion that she was pleased that the employees are not represented by a union, and that she preferred to supervise the CSRs without union constraints. In my view, this comment is little different than a supervisor expressing a preference for a non-union shop or even telling employees that they should not support a union, which are statements protected by Section 8 (c) of the Act. *Park 'N Fly Inc.*, 349 NLRB 132 and 133-134 (2007) (employer did not need a "damn union," union would not do employees any good and owner would not "go for a union in there"); *Evergreen America*, supra, 348 NLRB at 200, 204 (statements that union is "no good," "not good for you" and "not a good idea to support the

[23] *Fieldcrest Cannon Inc.*, 318 NLRB 470, 492-293 (1995) enfd. in pertinent part 97 F.3d 65 (4th Cir. 1996); *HarperCollins Publishers Inc.*, 317 NLRB 168, 180 (1995) enfd. in pertinent part 79 F.3d 1324, 1329-1331 (2nd Cir. 1996).

union"); *Children's Services International Inc.*, 347 NLRB 67, 68 (2006) (employer admittedly upset about employees' union activities remarked on employee' lack of education and told them they were lucky to have jobs; Board finds that employer was expressing opinion that employees were fortunate to have their jobs and did not say or imply that jobs would come to an end); *Rogers Electric Co.*, 346 NLRB 508, 509-510 (2006) (employer's statement that engaging in protected conduct was the "wrong way to make changes"; found by Board to be personal opinion "no different in kind from one in which an employer tells employees that there is no need to call a union in to resolve issues; the statement amounts only to a personal opinion protected by Section 8 (c) that the employees do not need a union"). See also *International Baking Co.*, 348 NLRB 1133, 1135 (2006) (Intemperate remarks that are merely expressions of personal opinion protected by Section 8(c)(1).

Accordingly, based on the foregoing, I recommend dismissal of this complaint allegation.

The complaint also alleges that on March 31, Respondent, by Longo, threatened its employees with discharge because they supported the Union and engaged in other union activities.

It is not clear what record testimony General Counsel is relying on to support this allegation since he makes no reference to it in his brief.

I have carefully reviewed the record and the only possible statement made on March 31, by Longo, which can be construed as a threat of discharge for union activity, is Longo's comment to Goines during her termination interview. After informing Goines that she was being terminated because of her performance on a call, Longo added that if she (Longo) goes through other recordings Goines wouldn't be the only one terminated and specifically mentioned Crofford, who had already been through two disciplinary customer service meetings.

While this statement by Longo could be construed as an implicit threat to terminate Crofford, I find not a scintilla of evidence that it can be construed as a threat to discharge Crofford based on her union activity. Longo did not mention the Union or any union activity of Crofford or Goines in connection with the "threat" to terminate Crofford. To the contrary, Longo only mentioned Crofford's name to inform Goines that she was not being singled out for termination based on Longo's evaluation of a CSR's performance on calls with clients. Thus, Longo told Goines that other employees, including Crofford, might also be terminated if and when Longo listens to tapes of their calls.

Further, as I observed above and will discuss more fully below, there is no record evidence that Longo was aware of any union activity by Goines or Crofford at any time.

I shall therefore recommend dismissal of this complaint allegation.

C. The Alleged Threat by Kumar

The complaint also alleges that Respondent, by Kumar, on or about March 14 informed employees that it would be futile for them to select the Union as their bargaining representative.

The complaint also alleges, and Respondent denies, that Kumar is and had been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2 (13) of the Act. In that regard, the evidence discloses that Kumar was a

scheduler along with Juan Alicea.[24] Both schedulers shared an office with Longo and their primary responsibility is to take care of the drivers' time off. They also review schedules for accuracy and move around schedules to make sure that they are efficient. The record does not disclose how they perform these functions and no evidence was adduced to indicate that they exercise any independent judgment in this capacity.

In mid-March, Longo went on vacation for a week and a half. At this time, Longo sent a memo to the CSRs stating that if they had any concerns or problems while she was away, the employees should see Kumar or Alicea. During this time, the employees submitted their bids for shifts to Alicea. Alicea received the bids and made up a schedule in conformance with the bid requests made by the employees. Alicea posted the schedules on the bulletin board.

Further, Flores testified that the schedulers were salaried personnel but were not supervisors, and Crofford testified that she did not consider Kumar or Alicea to be supervisors of Respondent.

Based on the foregoing, I conclude that General Counsel had fallen short of meeting its burden of establishing supervisory or agency status of Kumar. General Counsel relies on the fact that Kumar had been designated as an "acting manager" when she made the allegedly unlawful statement. However, the record does not disclose that Kumar was designated as an "acting manager," but only that employees should go to Kumar (or Alicea) if they had any problems while Longo was on vacation for a week and a half. Even if this "designation" can be construed as an appointment as an acting supervisor, that is far from sufficient to establish supervisory status.

The test for determining supervisory status of the employees, who substitute for supervisors is whether they spend a regular and substantial portion of their working time performing supervisory tasks. *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000); *Quality Chemical Inc.*, 324 NLRB 328, 331 (1997). Where as here, Kumar substituted for Longo only while Longo was on vacation, even if Kumar had exercised statutory supervisory authority when she so substituted[25], her assumption of supervisory duties are irregular and sporadic and would be insufficient to establish supervisory status. *Quality Chemical*, supra at 331. *Latas do Aluminio Reynolds*, 276 NLRB 1313 (1985).

Furthermore, mere substitution for a supervisor is insufficient, even if regular, unless the substitution involved the exercise of statutory supervisory responsibilities during the substitution. Here, General Counsel had adduced no evidence that Kumar exercised any such responsibilities whether while she was acting for Longo or when she was performing her regular function of a "scheduler."

General Counsel had not adduced any evidence that Kumar exercised independent judgment while she filled in for Longo or indeed at any other time. The only function performed by Kumar either when performing her regular job as "scheduler" or when she filled in for Longo was her involvement in scheduling employees. However, an individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor. *Dean & Deluca New York*, 338 NLRB 1046, 1048 (2003); *Jordan Marsh Stores*, 317

[24] The complaint also alleges that Alicea was also a supervisor of Respondent, although the complaint does not allege that Alicea engaged in any unlawful conduct.

[25] As detailed below, I find that General Counsel failed to establish that Kumar exercised such statutory supervisory authority either when she substituted for Longo or otherwise.

NLRB 460, 467 (1995). Absent evidence that Kumar (or Alicea)[26] exercised independent judgment in scheduling or in any other 2(11) function, I conclude that General Counsel has not met its burden of establishing supervisory or agency status[27] of Kumar and that this complaint allegation must be dismissed on that basis alone.

Furthermore, I am not persuaded that Kumar's comments, even if attributable to Respondent, are unlawful. In this regard, in mid-March Julie Fisher, a dispatcher and a union member, asked Crofford, "How is the union going?" Crofford replied, "Not very well and I don't want to talk about it." Kumar, who was present at the time, stated that part-timers cannot be union. Fisher responded that this was not true because drivers, who are part-time, are in the Union. Kumar made no reply and the discussion ended.

General Counsel argues that Kumar's comments represented a statement by management that the Union could not represent them and that unionization is prohibited.[28] Therefore, it is a threat of futility and violative of Section 8(a)(1) of the Act. *Wackenhut Corp.*, 348 NLRB 1290, fn 3 (2006). I disagree.

In my view, the statement made by Kumar is simply an opinion by Kumar, which may not be correct, that part-time employees could not be represented, which is protected by Section 8(c) of the Act. *Evergreen America*, supra, 348 NLRB at 204 (opinion of supervisor of problems in Los Angeles, where employees are represented by union); *Consolidated Biscuit Co.*, 346 NLRB 1175 fn 4 (2006).[29]

D. The Reduction of Hours and Change of Status

On March 3, Respondent changed the status of Crofford, Williams and Aunario from full-time to part-time, thereby reducing their hours from 40 to 30 per week. General Counsel contends, and the complaint so alleges, that such action was motivated by the employees' union activities and therefore violative of Section 8(a)(1) and (3) of the Act.

This allegation, as well as the other complaint allegations discussed below dealing with motivation for Respondent's personnel decisions,[30] requires an analysis under *Wright Line*, 251 NLRB 1083, 1088 (1980). The General Counsel has an initial burden of establishing by a preponderance of the evidence that protected conduct was a motivating factor in Respondent's

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[26] I note that the record discloses that while Longo was away, Alicea was the scheduler, who made out the schedule based on the bids submitted by the CSRs. Thus, it appears that Alicea and presumably Kumar did not exercise independent judgment while temporarily replacing Longo.

[27] I also conclude that agency status was not established since General Counsel has not introduced sufficient evidence that employees would reasonably believe that Kumar speaks for management. *Quality Mechanical Insulation*, 340 NLRB 798, 802 (2003).

[28] General Counsel notes that Crofford, plus two other full-time employees, had recently been switched to part-time status.

[29] *Wackenhut*, supra cited by General Counsel is not controlling. There a violation was found by an employer informing employees that its contract with a customer prohibited unions. However, this was a violation because it impliedly threatened loss of jobs by cancellation of the contract. 348 NLRB at 1297. There was no finding that the comment represented a threat of futility. Further, there is no evidence that Kumar remotely threatened any loss of jobs by her comment.

[30] The warning to and discharge of Goines and the discharge of Crofford.

personnel decision. If General Counsel meets that burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employees' protected conduct. The key factors utilized in assessing whether General Counsel has met its initial burden of proof are employer knowledge of the union activity, employer animus towards such activity and the timing of the personnel action in relation to the protected conduct. *Western Plan Service, Inc.*, 322 NLRB 183, 194 (1996).

Starting with the critical element of knowledge, the record establishes that all of the CSRs, whose status was changed, signed cards for the Union sometime in February, and discussed the Union among themselves or with union representative Clapper or with dispatcher shop stewards for the Union in January or February.

General Counsel argues that based on the "small shop theory," Respondent's knowledge of the union activity of these employers can and should be inferred. *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981) enfd. in relevant part, 670 F. 2d 1236 (1st Cir. 1982); *Electrical Specialties, Inc.*, 323 NLRB 705, 706 (1997); *Beverly Enterprises*, 310 NLRB 222, 287 (1993) enfd. in relevant part, 17 F.3d 580 (2nd Cir. 1994). I cannot agree.

While in some circumstances, the small size of a plant permits an inference that an employer had knowledge of union activities of particular employees, *American Spring Bed*, supra; *Weise Plow Welding*, 123 NLRB 616, 618 (1959), such an inference is not automatic and generally is insufficient in itself to establish knowledge. *Basin Frozen Foods*, 307 NLRB 1406, 1408-1409 (1992). The proper test as enunciated back in 1954 is as follows: "However, the mere fact that Respondent's plant is of a small size, does not permit a finding that Respondent had knowledge of the union activities of specific employees, absent supporting evidence that that union activities were carried on in such a manner, or at times that in the normal course of events, Respondent must have noticed them." *Hadley Mfg. Co.*, 108 NLRB 1641, 1650 (1954).

In assessing whether this test has been met, an inference of employer knowledge based on the size of the shop is not appropriate, where as here the employees made a conscious effort to conceal their union activities, even to the extent of failing to discuss such activities with employees, who they felt might notify management of such union discussions or organizing. *Bryant and Cooper Steakhouse*, 304 NLRB 750, 751-752 (1991); *Unite Here Local 26*, 344 NLRB 567, 570 fn. 3 (2005), *Millcraft Furniture Co.*, 282 NLRB 593, 607 (1987); *K & B Mounting*, 248 NLRB 570, 571 (1980); *Mantac Corp.*, 231 NLRB 858 fn. 2 (1977).

General Counsel also relies on the fact that on February 26, Clapper on behalf of the Union spoke with Flores and according to General Counsel requested recognition on behalf of the Union. I do not construe Clapper's conversation as a recognition demand. He merely informed Flores that the Union was interested in bringing the CSRs into the Union. After Flores responded that Respondent has a Freedom of Association Policy and its employees have the right to organize the Union, Clapper replied "great," and added that he would have the Union's attorney draw up an amendment to the contract. Flores responded that it doesn't work that way and there is a "process." Notably, Clapper did not offer to show or show any cards to Flores, nor did he assert that the Union represented a majority of the employees. He merely asked Respondent to cover the CSRs under the contract. Respondent correctly refused this demand stating that there was a process (i.e. organizing the employees, obtaining authorization cards and filing a petition to the Board for an election).

I therefore do not construe this discussion to encompass a demand for recognition but merely a desire for inclusion of the CSRs under the contract. While this contact with the Union does reflect that the Union was interested in covering the employees under the contract, which

perhaps could also be presumed to include recognition as part of the demand, its importance *vis a vis* Respondent's knowledge is minimal. Thus, as far as Respondent knew, the Union had made no efforts to organize CSRs and that there had been no union activity or organizing by any employee. Therefore, I find that this conversation establishing only the Union's interest in covering CSRs under the contract did not establish knowledge on the part of Respondent that any employee, much less the three employees whose hours were cut, had engaged in any union activities[31] or had expressed any interest in the Union as of March 3, when the reduction in hours was announced.

The next element considered in assessing whether General Counsel has met its burden of proof is the presence of animus towards the Union or to the union activities of its employees. I find that such evidence is lacking here.

The only violation of Section 8(a)(1) of the Act that I have found above was one instance of an unlawful interrogation by Longo. However, this interrogation was not related to any union activities of employees, but to protected concerted conduct of employees in supporting their fellow employees. Such an isolated act, unrelated to union activities is insufficient to infer union animus. *Millcraft Furniture*, supra, 282 NLRB at 593 fn.2 (Board finds that discharge of an employee for engaging in protected concerted activity is insufficient to establish union animus concerning discharge of a different employee allegedly for engaging in union activity). In establishing animus, General Counsel relies primarily on Longo's statement to employees, "Thank God, you guys are not in the Union."

I have concluded above contrary to General Counsel's position that this statement is protected by 8(c) of the Act and not unlawful.

However, that finding is not the end of the inquiry. The Board has consistently permitted reliance on statements by an employer that demonstrates its opposition to unionization of its employees or in general to unions, even where the statements are protected by Section 8(c) of the Act. *Norton Audubon Hospital*, 338 NLRB 320 fn. 1(2002); *Tim Foley Plumbing Service*, 337 NLRB 328, 329 (2001); *Stoody Co.*, 312 NLRB 1175, 1182 (1993); *Ross Stores*, 329 NLRB 573, 576 (1999), enfd denied in part and enfd in part (DC Cir. 2001).

However, it is significant that a number of Circuits have disagreed with the Board on this issue and concluded that the Board cannot rely on statements protected by Section 8(c) of the Act to establish animus. *NLRB v. Lampi LLC*, 240 F.3d 931, 936 (11th Cir. 2001); *Medeco Security Locks v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998); *BE & K Construction Co. v. NLRB*, 133 F.3d 1372, 1376-1377 (11th Cir. 1997); *Carry Co. of Illinois v. NLRB*, 30 F.3d 922, 927-928 (7th Cir. 1994); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345-1347 (2nd Cir. 1990); *NLRB v. Eastern Smelting and Refining*, 598 F.2d 666, 670 (1st Cir. 1979); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 750-754 (5th Cir. 1979). See also *Ross Stores v. NLRB*, 235 F.3d 669 (DC Cir. 2001), where the panel affirmed the Board's finding of an unlawful discharge based in part on statements made by Vice President that "He would do anything in his power to keep the union out of the building." Although the Board did not find the statement violative of the Act, it

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[31] I recognize that as of February 26 and March 3 the Union had in fact obtained five signed authorization cards from the CSRs, including all three CSRs whose hours were reduced. However, Clapper did not show any cards to Flores and did not even tell Flores that the Union had obtained such cards. To the contrary, he merely demanded that the CSRs be covered under the contract, suggesting that the Union was not interested in and had not obtained any cards from any employees.

considered it as evidence of animus establishing the employer's motive. 329 NLRB at 576.[32] However, the employer therein had not challenged the Board's reliance on conduct protected by Section 8(c) as animus. Nonetheless, a majority of the panel concurring in enforcement, based on the employer's failure to raise the issue, wrote separately and expressed their agreement with their sister Circuits that the Board's reliance on conduct not violative of the Act to establish animus was in direct violation of Section 8(c) of the Act and beyond the Board's authority. 235 F.3d at 676.

I also note that there are some Circuit Court decisions that support the Board's view on this issue. *NLRB v. Vemco Inc.*, enfd in pertinent part 989 F.2d 1468, 1473-1975, 1477 (6th Cir. 1993); *Orchard Corp. v. NLRB*, 408 F.2d 341 (8th Cir. 1969). I am of course bound by the Board law on this issue regardless of the Circuit in which the case arose. *Tim Foley Plumbing*, supra, 337 NLRB 329 fn. 5 and cases cited therein.

However, I also find it appropriate to observe that the Board itself has recently been somewhat skittish about applying this doctrine, and indeed a number of Board members have expressed their disagreement with the concept that conduct protected by Section 8(c) of the Act can be relied on in any way to prove the existence of an unfair labor practice.

For example, in *Norton Audubon Hospital*, supra, 338 NLRB at 320, Member Bartlett, joined by Member Cowan, recognized that Board precedent permits reliance on such statements but stated that they would not do so in the case but nonetheless affirmed the finding of the ALJ that the discrimination involved was violative of the Act. Member Liebman also stated that she finds it unnecessary to rely on the employer's statements opposing the union in finding anti-union animus in affirming a violation, but affirmed her view that statements may properly be considered as background evidence of animus citing *Tim Foley Plumbing*, supra and cases cited therein.

Tim Foley Plumbing, supra, 337 NLRB at 328, was an EAJA case, wherein the Board reversed an ALJ, who had awarded fees, because he believed that no prima facie case of discrimination had been demonstrated by the General Counsel. The Board reversed the ALJ on several grounds, including the judge's refusal to consider that the employer's anti-union comments while lawful may nonetheless be considered as background evidence animus toward employees' union activities. 337 NLRB at 329.

Chairman Hurtgen, who had dissented in *Ross Stores*, supra, one of the cases cited by the majority in *Tim Foley Plumbing*, stated that he adhered to his position in *Ross Stores* that statements protected by Section 8(c) cannot form the basis of a finding that General Counsel had demonstrated animus toward union activity. However, Chairman Hurtgen agreed with the majority (Members Walsh and Liebman) that the EAJA award should be reversed since General Counsel relied on Board precedent in arguing that the applicant's statement was indicative of union animus. Finally, as I already noted above, Member Brame joined Chairman Hurtgen in refusing to rely on lawful statements as a demonstration of animus. 329 NLRB at 580 and 584 fn. 4.

Somewhat more recently, in *Toll Mfg. Co.*, supra, 341 NLRB 832, Chairman Battista agreed with the judge and Member Walsh that a violation had been established. However, the Chairman, in footnote 4 at 833, disagreed with the judge as well as with Member Walsh, and did not rely on statements of opposition to the union, which in his view was protected by 8(c) and

[32] Members Hurtgen and Brame dissented with respect to this issue.

cannot be used to establish animus.

Member Schaumber dissented as to the finding of a violation for a number of reasons, and specifically noted his agreement with the Chairman that statements in opposition to the union does not evidence antiunion animus. *Id* at 842.

Thus, a majority of the panel in *Toll Mfg.*, supra, would not rely on protected 8(c) conduct to establish antiunion animus.

My research has uncovered no case since Toll Brothers, supra, which was decided in 2004, where the issue of using 8(c) conduct to establish animus was discussed by the Board.

Thus, although current law as described above remains that the Board may consider such conduct in assessing antiunion animus, I deem the law somewhat unsettled and likely to be reconsidered whenever the Board reaches full membership. In my humble opinion, I am in agreement with the majority of the Circuits, plus a number of Board members that statements made in opposition to a union or unionization, if not unlawful and protected by 8(c) cannot and should not be used to infer antiunion animus. In my view, Section 8(c) states clearly that such comments shall not constitute evidence of an unfair labor practice under the Act, if it contains no threat or promise.

Nonetheless, I must apply current law as it is and I shall do so. But I also find it appropriate to consider the somewhat unsettled state of the law, as I have described above, in assessing the significance of Longo's alleged "anti-union" statement as demonstrative of anti-union animus.

In that regard, I conclude that in the circumstance of this case, that even assuming that Longo's comments can be construed as indicating her opposition to unions or even to unionization of Respondent's CSRs, it is insufficient to establish anti-union animus by Respondent. I note initially that as I observed above in dismissing the allegation that the comment by Longo was a coercive threat, there was no evidence that Longo in particular or Respondent in general was aware of any union activity by any of its employees when the comment was made by Longo. Her remarks were made not in the context of any discussion of unionization by the CSRs since Longo was unaware of such activity at the time. Therefore, in my view, Longo's comment should not be construed as evidence of anti-union animus, supporting a finding that subsequent actions of Respondent even after it became aware of some potential union activity was unlawfully motivated.

Most significantly of all, I rely on Respondent's Freedom of Association Policy described above. By this policy, Respondent's supervisors were forbidden to attempt to persuade employees to support a union and supervisors, who violate the policy, can be subject to termination.

I conclude that based on this policy as well as the other factors, described above that Longo's comment was little more than her personal opinion that if the CSRs had a union it could constrain her ability to manage her employees. It is therefore too ambiguous to be construed as supporting an inference that Respondent might discriminate against employees because they actually engaged in union activity.

Accordingly, I find that General Counsel had failed to establish the element of animus in its attempt to prove that a motivating factor in Respondent's decision to reduce the hours of CSRs was their union activity.

Turning to the element of timing, General Counsel places significant reliance on the fact that the change of status and consequent reduction of hours occurred a week after Clapper's discussion with Flores about representing the CSRs. Indeed, this timing is suspicious and in some circumstances could be construed as substantial evidence of anti-union motivation. *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995); *Fiber Products*, 314 NLRB 1169, 1186 (1994). However, the circumstances here do not warrant such an inference.

As I have explained above, the conversation between Clapper and Flores did not contain a specific recognition demand, but merely a request to include the CSRs under the Union's current contract covering the dispatchers. Clapper did not inform Flores that the Union had made any efforts to organize the CSRs or that the union had obtained any authorization cards (much less had obtained majority support) or even that any CSRs had expressed any interest in being represented by the Union. Thus, as of the date of the reduction in hours, Respondent had no knowledge that any CSRs had engaged in any union activities or that any of them had even expressed or had any interest in union representation. Thus, I find that Clapper's remarks to Flores was not likely to have had any impact on Respondent's personnel decisions, since as far Respondent knew its CSRs had no interest in the Union.

Further, I also rely again on Respondent's Freedom of Association Policy. In view of that policy, which essentially requires Respondent to be neutral in union campaigns, I find it highly improbable that even the future possibility of a union campaign, which could be inferred from Clapper's requests, would motivate Respondent to retaliate against the CSRs by changing their status. Respondent has been dealing with unions, including Local 631, which represented its dispatchers, and I credit the testimony of both Flores and Longo that they did not care if employees supported a union or not. It was the employees' choice, in their view, consistent with Respondent's Freedom of Association Policy, and indeed that is precisely what Flores told Clapper when he requested that Respondent cover the CSRs under the dispatcher's contract.

Finally, the significance of the timing is further diminished by the fact that the evidence establishes, based on Longo's undenied, unrefuted and credible testimony that the decision to change the status of the CSRs was made pursuant and in conjunction with budgetary cutbacks ordered by higher management. In that regard, Respondent considered laying off some CSRs but decided rather to change status and reduce hours because Longo and Flores felt that it would be unfair to lay people off in this economy. Additionally, Respondent, pursuant to the same cost cutting decision, at around the same time as the change of status, laid off 33 drivers and 2 supervisors. This evidence reduces substantially the significance of the timing of the change of status. *Music Express East*, 340 NLRB 1063, 1064 (2003).

General Counsel argues in this regard that Respondent's evidence that the decision was motivated by budget factors should not be believed since after the decision Respondent hired two part-time employees and permitted Horwich, who initially had been transferred into the department, to remain as a CSR. However, these decisions were adequately and convincingly explained by Longo. She decided to retain Horwich because Buchner had informed Longo that she was quitting. The other two new hires, who were hired in April, were replacements for Goines and Zapata, who were both terminated.

Accordingly, based on the foregoing analysis, I conclude that General Counsel had failed to establish by a preponderance of the evidence that the union activity of the three CSRs was a motivating factor in Respondent's decision to change their status and to reduce their hours.

Moreover, assuming that I found that General Counsel had met its burden of proving that a motivating factor in the decision was union activity, I would conclude that Respondent has met its burden of establishing that it would have taken the same action absent any union activities.

As I have observed above, the credible evidence based on Longo's uncontradicted testimony establishes that Respondent's decision to change the status of the CSRs was part of the budget cutting process, which included the layoffs of 33 drivers and 2 supervisors and would have occurred notwithstanding any union activity that may have taken place.

I shall therefore recommend dismissal of this allegation in the complaint.

E. The Alleged Discrimination against Goines and Crofford

1. The Warning to Goines

The complaint alleges that on or about January 21, "Respondent issued an unwarranted written warning to its employee Goines" because Goines "assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities."

I frankly do not understand the significance or purpose of the complaint allegation that the warning was "unwarranted and undeserved." These comments add nothing to the appropriate analysis. The issue is not whether the warning was "undeserved or unwarranted" but whether it was motivated by Goines' union activities or support. It is unnecessary for me to decide whether the warning was "undeserved or unwarranted" and I shall not do so.

Once again it is necessary to utilize the *Wright Line* analysis in addressing the lawfulness of the warning issued to Goines.

I find that General Counsel has not come close to meeting its *Wright Line* burden of proof that Goines' union activities was a motivating factor in Respondent's decision to issue her a warning.[33]

At the time of the warning, January 21, there had been minimal union activity. Clapper asked several employees, including Goines, in December or January about their possible interest in the Union and told them the he would try to see if the Union could cover the CSRs. The employees made no response to Clapper during these discussions. However, in January, five of the employees, including Goines, discussed among themselves Clapper's visits and expressed interest in joining the Union.

Thus, as of January 24, the date of the warning, no union cards had ever been distributed or signed. As I discussed above in relation to the reduction in hours issue, there is no record evidence that any supervisor was present at or was aware of these conversations about the Union or indeed the actual card signings in February.

I reject the General Counsel's reliance on the "small shop doctrine" to establish knowledge of such activities for the reasons and authorities detailed above. I also credit Longo and Flores that neither of them was aware of any such discussions or whether Goines or any

[33] Notably, General Counsel makes no argument in its brief as to why it believes this complaint allegation has merit. Since the allegation has not been withdrawn, it is necessary to decide it.

other CSR had signed cards or supported the Union.

Furthermore, Clapper's discussion with Flores concerning covering the CSRs under the union contract did not occur until February 26, well after the warning.

Therefore, as of January 24, General Counsel has failed to establish that Respondent was aware of *any* union activity involving its CSRs, much less any union activity by Goines.

This failure of proof on behalf of General Counsel is fatal to its complaint allegations and is sufficient in itself to warrant dismissal. *The Continental Group*, 353 NLRB #31 slip op at 4, ALJD slip op at 17 (2008); *Bryant and Cooper*, supra, 304 NLRB 752.

While I need go no further to recommend dismissal of this allegation, I deem it appropriate to discuss Respondent's defense because the complaint allegation states that the warning was "undeserving and unwarranted" seems to suggest an assertion by General Counsel that the defense was pretextual. However, I cannot agree with this assertion. In this regard, I need not resolve the credibility resolutions involving whether or not Goines cursed during her argument with Buchner over the "sweet and sour" sauce, which precipitated the warning. While General Counsel did present several witnesses, who corroborated Goines' account that she did not curse during the argument, it is unnecessary to make findings on that issue.

It is sufficient to find, which I do, that Respondent had a reasonable belief that Goines used "inappropriate" language, including cursing at Buchner, during the meeting. Longo obtained written statements from Buchner plus a statement from another CSR, Williams[34], stating that Goines did in fact curse at Buchner and had created a "hostile work environment." In such circumstances, I find that Respondent's warning was based on a reasonable belief that Goines had used inappropriate language during the argument with Buchner and that this was the sole reason for its decision to issue the warning to Goines. Indeed, even if I had found that General Counsel established a *prima facie* case, which I do not, I would conclude that Respondent established, based on this reasonable belief of Longo, that it would have issued the warning to Goines in any event (i.e. absent her protected conduct) and that it did not violate the Act. *Consolidated Biscuit Co.*, 346 NLRB 1175, 1180-1181 (2006).

Accordingly, based on the foregoing, I recommend that this complaint allegation be dismissed.

2. The Termination of Goines

It is once again necessary to utilize the *Wright Line* analysis in assessing the alleged violations of the Act by Respondent's termination of Goines. Many of the essential issues have already been discussed above in connection with my analysis of the reduction of hours allegation. My findings therein concerning knowledge and animus are equally applicable to the issue of the termination of Goines.

As to the element of knowledge, General Counsel relies on the small shop theory and asserts that Respondent "must have known" that Goines signed a union card and/or was a union supporter. As I have concluded above with respect to the issue of the status change, I find

[34] I note that Williams was one of the CSRs, who subsequently signed union cards and seemed to have been friendly with Goines.

once more that the small shop doctrine is not appropriate here. The employees were careful to keep their union activities, including signing of cards, hidden from management and even hidden from two employees whom they suspected might inform management of their activities. In these circumstances, the small shop doctrine cannot be used to support an inference that Respondent knew of the union activities of Goines. *Unite Here*, supra, 344 NLRB at 570*; Bryant & Cooper*, supra, 304 NLRB at 752; *Millcraft Furniture*, supra, 282 NLRB at 607; *K&B Mounting*, supra, 248 NLRB at 571; *Mantac Co.*, supra, 231 NLRB at 858.

General Counsel has presented no other evidence of Respondent's knowledge of any union activities of Goines. That, in itself, is sufficient to warrant a finding that it has failed to establish that her union activities were motivating factors in Respondent's decision to terminate her. *Continental Group*, supra, 353 NLRB #31; *Music Express*, supra 340 NLRB at 1064-1065; *Bryant & Cooper*, supra 304 NLRB at 751-752.

That leaves the only knowledge of any union activity involving the CSRs in the record to be Clapper's conversation with Flores on February 26. As discussed above, this discussion did not involve a specific request for recognition but merely a request that the CSRs be covered under the contract. More importantly, Clapper said nothing about whether the Union had obtained any authorization cards or support amongst the CSRs, or even whether he had spoken to any CSRs about union representation. Thus, as far as Respondent was concerned, the Union had made no efforts to organize the CSRs and that none of its employees, including Goines had engaged in any union activities or were supporters of the Union. Therefore, in my view, Respondent know only that the Union sought to cover the CSRs under its contract and *might* sometime in the future seek to organize the CSRs. This is not knowledge likely to motivate Respondent to terminate two employees.[35]

My discussion of anti-union animus with regard to the reduction of hours is also applicable here. General Counsel relies principally on Longo's statement "Thank God, you guys are not union." As detailed above, I do not find this statement coercive and have dismissed the complaint allegations so contending, consistent with my prior discussion and case law. I conclude that in these circumstances the statement does not constitute significant demonstration of animus. It was made at a time when Longo was not aware of any union activity and was made in connection with a discussion about seniority. It had no reference to any union activity of any employee, which as far as Longo knew, had not taken place. Further, Respondent's Freedom of Association policy is much more significant, than Longo's ambiguous personal opinion of the effect of unionization of CSRs in assessing motivation. Therefore, I find insufficient evidence of animus to convince me that Respondent's decision to terminate Goines was motivated by any union activities or other protected conduct.

Additionally, the element of timing, which did raise some suspicions in evaluating the

[35] In this regard, Respondent emphasizes the testimony of Flores and Longo that Flores did not inform Longo of her conversation with Clapper. I credit this mutually corroborative testimony particularly in light of Respondent's Freedom of Association policy. Since I find that Flores had no problem with the employees being represented by the Union, which she mentioned to Clapper, I find it probable that she would not bother to tell Longo about the conversation. However, I conclude that this finding is not relevant. While Respondent characterized Longo as the "decision maker" in the terminations, the evidence does not support that conclusion. In fact, Longo discussed her recommendation to terminate Goines with Flores, who signed off on the decisions. Thus, Flores was the "decision maker" and Respondent is charged with knowledge of Clapper's discussion with Flores.

reduction of hours, is not supportive of a violation in the case of the discharges of Goines. She was terminated on March 31, approximately five weeks after Clapper's conversation with Flores. Therefore, I find the warning remote in time in regard to the union activity, and that there is nothing about the timing of Goines' discharge that suggests that Respondent was motivated by union animus. *Neptco Inc.*, 346 NLRB 18, 20 (2005); *Snap-On Tools Inc.*, 342 NLRB 5, 9 (2004). Further, the timing of Goines' discharge is not suspicious since it coincided with the incident that Respondent asserts motivated the termination – Goines' alleged poor performance in handling a particular phone call. *Music Express*, supra, 340 NLRB at 1064; *Snap-On Tools*, supra at 5.

Thus, I find that based on the elements necessary to meet General Counsel's *Wright Line* burden (knowledge, animus and timing), General Counsel has fallen short of establishing that a motivating factor in Goines' discharge was her union activities.

General Counsel argues however that any deficiencies in its prime facie are remedied by a finding that Respondent's stated reason for terminating Goines was a pretext. *McBurney Corp.*, 351 NLRB 799, 800-801 (2007); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 16-17 (2005); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (employer failed to follow its own progressive discipline system); *Embassy Vacation Resorts*, 340 NLRB 846, 848-849 (2003) (animus shown by employer's failure to give employees a chance to defend themselves and its deviation from its past practice of discipline); *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003) (employer failed to follow its progressive discipline policy).

In support of its contention that Respondent's decision to terminate Goines was pretextual, it argues that Respondent departed from its prior practice of providing employees with due process and its failure to follow its own progressive disciplinary policy. I find that neither of these factors are sufficient to establish that Respondent's defense with respect to Goines' discharge is pretextual and/or sufficient to warrant an inference that her union activity was a motivating factor in Respondent's decision to terminate her.

Turning to General Counsel's former contention, General Counsel does not detail specifically what practice of providing employees with due process has been violated by Longo. The record does establish that after Crofford was terminated, Longo filled out a form entitled "Termination Checklist for All Employees." This document reflects a number of questions and answers to be furnished by the terminating official and to be submitted to Human Resources. One of the questions on this form asks whether the employee was given due process ("management interviewed the employee and provided an opportunity for them to present their version or explanation of the story/incident/accident report?").

However, the record contains no evidence whether or not Longo filled out a similar form for Goines. Nor does the form itself prove that Respondent had in place an established practice of providing employees with due process as defined therein as giving employees an opportunity to explain their version of the incident involved.

Longo was asked by General Counsel if she had provided such "due process" to Goines. She replied that she had done so by asking Goines prior to the discharge decision to terminate her. Indeed, Goines testified that Longo had asked her to prepare a memo of what she recalled about the incident. Goines further testified that she prepared such a document and put it in Longo's mailbox. However, according to Goines, Longo never picked up the incident report and Goines eventually removed it from the box and took it home. Goines further testified that her report essentially confirmed what was on the tape.

Based on all these circumstances, I find very little significance in Longo's conduct *vis a vis* "due process," and certainly insufficient evidence to characterize the decision to terminate Goines as pretextual.

Initially, I note that whatever appears on Crofford's discharge form, the evidence does not disclose whether Longo filled out a similar form after she terminated Goines. In either event, the record did not establish any regular practice of Respondent following "due process," i.e. giving employees a chance to present their version of the incident. Further, Longo did request that Goines write up her version of the incident.

More importantly, Goines' version essentially corroborated the tape, so Longo's failure to pick it up as Goines asserts is inconsequential. Since Longo testified that her decision was based on the tape and Goines' performance therein, Goines' version of the incident has little significance particularly where her version essentially corroborated what was on the tape. I note that while in some case the failure to question an employee about an incident prior to discharge can be evidence of discriminatory intent, that finding is not automatic and depends on circumstances of each case. The Board does not impose a "due process" standard on employers in assessing how employers conduct their investigations of incidents leading to discharge. *Consolidated Biscuits Co.*, supra 346 NLRB at 1176 fn. 7. Here, as noted above, since the discharge decision was purportedly based on the tape and Goines concedes that the tape was accurate, the failure of Longo to obtain Goines' version is insignificant and far from sufficient to establish that Longo's decision to terminate Goines was pretextual.

General Counsel's contention concerning Respondent's failure to follow its own disciplinary policies is more troublesome. The evidence with respect to Respondent's disciplinary policies is somewhat murky. Thus, Longo testified that prior to March 15, Respondent followed a progressive disciplinary policy, beginning with counseling, a written warning, a one-day suspension and then discharge. However, the record does not include this policy in written form. The record does include a written policy in the manual used by Laidlaw, Respondent's predecessor contractor, and which manual was distributed to Respondent's employees and followed by Respondent until March 15 when Respondent issued its own manual. The Laidlaw manual does not include a detailed progressive disciplinary policy and gives the employer substantial discretion in disciplinary matters and provides that in each case, the nature of the incident and past record will be considered.

On March 15, Respondent issued its own manual, including a detailed progressive disciplinary policy. It details several classes of violations which appear to encompass the conduct for which Goines was allegedly terminated. For Class 4 violations, the policy calls for written warnings for the first and second offenses, a suspension for the third and finally a discharge for the fourth offense within 12 months of the first.

When asked about whether Longo applied this system, she testified that she attempted to do so and that in her opinion since she had issued Goines a "last and final warning," a suspension was not necessary.

Furthermore, and perhaps more importantly, the final warning notice relied on by Longo was given to Goines based on Goines' conduct during an argument with Buchner and was for a "hostile work environment and inappropriate language and behavior." The warning goes on to state that "within the first 90 days of your return if I hear, witness or your co-workers continue to come to me and provide me with written collaborating stories regarding your unprofessional behavior in the workplace you will be terminated for gross disregard of policy."

When asked about this notice, Longo focused on the fact that "unprofessional behavior" includes poor performance while handling calls.

I conclude that Longo's interpretation of this notice is strained and probably incorrect. I further find that in my view, Respondent also did not comply with Respondent's own disciplinary policy. In my opinion, the warning notice clearly was based on Goines' conduct during the argument with Buchner and was based on inappropriate behavior in that context. Longo's testimony that poor customer service performance is encompassed by "unprofessional behavior" in the notice is strained at best and unreasonable at worst. Further, Longo's explanation for not following Respondent's progressive policy, whether it was based on Longo's testimony of prior policy or the March 15 policy, is again dubious.

However, my opinion on these issues is not dispositive. If I were an arbitrator and charged with interpreting these provisions under a grievance procedure, I would have little difficulty in concluding that Respondent violated its own procedure and did not establish just cause for discharge. However, that is not my role here. I must decide only if the discharge was motivated by the union activity of Goines.

In that regard, it is well settled that the Board does not substitute its own judgment for the employer's as to what discipline would be appropriate. *George Mee Memorial Hospital*, 348 NLRB 327, 332 (2006); *Fresno Bee*, 337 NLRB 1161, 1162, 1181 (2002). It is not appropriate for me to use my subjective judgment to second guess Longo's disciplinary decisions and her interpretation of Respondent's disciplinary procedures. *Consolidated Biscuit*, supra, 346 NLRB at 1180 (judge erred by substituting his own subjective definition of insubordination used by employer.)

I need only find, which I do, that Longo in fact believed that her interpretations of the policies were correct and that she made her decision to terminate Goines based on such interpretations as well as her view that Goines had mishandled the call with a client.

In this respect, I rely on a number of factors. Notably, it must be emphasized that Longo was appointed to supervise the CSRs in January in the context of numerous complaints from RTC about the performance of the CSRs. I find that Longo was determined to reverse this trend and to improve the performance of the CSRs to meet the expectations of the RTC. I also conclude that Longo was somewhat overzealous in her approach and that she gave little recognition to Respondent's personnel policies as well as to normal Human Resources factors. In this regard, I also note that Longo received no HR training and probably was unaware of any due process requirements.

Thus, I find that Longo paid scant attention to Respondent's personnel policies. However, I do not find her interpretations of Respondent's policies to be frivolous, and I believe that either she thought that she was complying with the policies or perhaps she ignored them altogether in her haste to straighten out the poor performance of the CSRs that had produced complaints from RTC.

I also have considered as argued by General Counsel that Goines was never warned about poor performance or about the failure to show emotion during a call. However, as I have observed above, whether I consider it unfair or too harsh to terminate Goines for her conduct for which she had received no prior warnings, is not determinative. That judgment is for Respondent to make, not me or the Board.

Finally, I would note that the failure to follow an employer's progressive disciplinary

policy is insufficient in itself to establish that a discharge was pretextual or unlawful. *Consolidated Biscuit*, supra, 346 NLRB at 1181.

In this regard, none of the cases cited by General Counsel[36] finds that failure to follow a progressive disciplinary policy is sufficient in itself to find a discharge pretextual or unlawful. Indeed, all of these cases contained evidence of other factors supporting a finding of a violation, not present here, such as knowledge of union activity, animus and/or disparate treatment and were concerned primarily with assessing whether the employers therein met their Wright Line burden of proof, rather than as here, assessing whether General Counsel has established its initial *Wright Line* burden of proving that union animus was a motivating factor in the discharge decision.

Accordingly, I find that although Respondent's conduct in terminating Goines encompassed less than efficient HR principles and was somewhat suspicious, it was too ambiguous to warrant the conclusion that it was pretextual.

Therefore, based on the above analysis, I find that General Counsel has failed to establish that Goines' union activity was a motivating factor in Respondent's decision to terminate her. I shall therefore recommend that this complaint allegation be dismissed.[37]

3. The Termination of Crofford

The assessment of Crofford's discharge must once again commence with the *Wright Line* analysis. Much of the discussion and arguments detailed above with respect to Goines' termination are again relevant. My conclusions therefore are also the same.

I find that General Counsel has failed to meet its burden of establishing that Crofford's union activity was a motivating factor in Respondent's decision to terminate her.

Once again, as in the case of Goines' discharge, the lack of probative evidence that Respondent was aware of any union activity or support by Crofford is fatal to General Counsel's attempt to meet its *Wright Line* burden of proof. *Continental Group*, supra, 353 NLRB slip op #31 at 4; *Bryant & Cooper*, supra and other cases cited above. I once again reject General Counsel's reliance on the small shop doctrine for the reasons and precedent cited in the discussion of Goines' discharge.

In this regard, General Counsel argues that the inference of knowledge of Crofford's

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[36] *McBurney*, supra, 351 NLRB at 800-801; *Zurn/N.E.P.C.O.*, supra, 345 NLRB at 16-17; *Toll Mfg. Co.*, supra, 341 NLRB at 833; *Embassy Vacations*, supra, 340 NLRB at 348-349; *Guardian Automotive*, supra, 340 NLRB at 475.

[37] Since I have recommended dismissal of this complaint allegation, I have no power to issue recommendations concerning Respondent's treatment of Goines. However, in view of the facts detailed above that Respondent placed a supervisor in charge of a department without any HR training and that this supervisor in her zeal to improve the performance of her department failed to follow Respondent's disciplinary policies, as well as her own prior disciplinary warning, it would not be inappropriate for Respondent to make some accommodation for Goines. Notably, Respondent has instituted and enforced its Freedom of Association policy and seems to be interested in fostering harmonious employee relations. Thus, although it is not obligated to do so, perhaps an offer of reinstatement to Goines might be appropriate to afford her another chance to improve her performance.

union support is strengthened by consideration of a dispatcher's questioning of Crofford as to "How the Union is going?" in the presence of Kumar. Crofford replied "Not very well, I don't want to talk about it."

General Counsel argues that it is highly doubtful that Kumar, Longo's officemate would not have passed this information to Longo. I find this contention to be pure speculation and conjecture, and I cannot and do not make such a finding. I have concluded above that General Counsel has not established the supervisory or agency status of Kumar. Therefore, whatever knowledge Kumar may have of Crofford's union activity based on this conversation cannot be imputed to Respondent. *Central Plumbing*, supra, 337 NLRB at 975-976. I therefore reaffirm my finding the General Counsel has not established that Respondent had any knowledge of any union activity or support by Crofford.

The evidence also reveals, however, that the Union finally filed a petition on April 9, six days prior to Crofford's termination. Thus, the close proximity of the filing of the petition to the discharge does raise some suspicions. However, these suspicions are dissipated by the fact that the discharge also coincided in time with Crofford's alleged poor performance on the Quabner phone call, which resulted, according to Longo in her decision (after she investigated and considered Crofford's past record) to recommend that Crofford be discharged. *Music Express*, supra 340 NLRB at 1064; *Snap-On Tools*, supra 342 NLRB at 5; *Central Plumbing*, supra, 337 at 975.

As for animus, my discussion above with respect to Goines is equally applicable here. No significant evidence of animus has been presented by General Counsel. Even considering Longo's statement, "Thank God you guys are not union" to be evidence of animus, I find it insufficient to infer a connection between the discharge and protected conduct. *Society to Advance the Retarded & Handicapped*, 324 NLRB 314, 315 (1997) (single statement of opposition to unionization insufficient to infer anti-union motivation).

Moreover, it is also notable that there is no evidence that Crofford with minimal union activity was commented upon or singled out by any management official for her union activities. *Ronin Shipbuilders, Inc.*, 330 NLRB 464, 465 (2000). Thus, notwithstanding the somewhat suspicious timing of the discharge, I find insufficient record evidence to conclude that it was more probable that Crofford was terminated because of her minimal union activity than because of Respondent's dissatisfaction with her customer service performance. *Ronin Shipbuilders*, supra (no violation found even where, unlike here, the discriminatee was a known union supporter).

Finally, General Counsel argues, as he did in connection with Goines, that Respondent's purported reasons for terminating Crofford were pretextual. He contends again that Respondent failed to afford Crofford due process contrary to its past practice, that Crofford was discharged for conduct for when she had not received a warning, and that Respondent failed to follow its own disciplinary policy by disregarding its amnesty memo of April 3.

Considering these contentions in order, I have already discussed the "due process" issue in connection with Goines. My conclusions with respect to Crofford are similar. General Counsel has not established the existence of any past practice of Respondent affording "due process" to employees. More importantly, in the circumstances here, where the discharge was based on Crofford's performance on the tape (as well as Longo's evaluation of Crofford's past record), there is little reason to obtain Crofford's version of the incident. I therefore find little significance in Respondent's failure to ask Crofford for her version of the call prior to Respondent terminating her.

Turning to General Counsel's second argument, the alleged failure to warn Crofford, I disagree with General Counsel. Crofford had received several prior warnings for poor customer service performance, and even her suspension in November 2008 was based on deficiencies in her customer service performance although not precisely for the same conduct, which led to her termination.

The final contention of General Counsel relating to the alleged failure to follow Respondent's amnesty policy is more troublesome. As General Counsel correctly points out, Respondent on April 3 issued a document entitled, "Fresh Start on Many Discipline Matters," which reflects that effective April 4 employees will be given a "fresh start" with regard to progressive discipline and that subject to certain exceptions, no infractions or incidents that occurred prior to April will be considered for future progressive discipline. One of the stated exceptions to this "amnesty" policy is "last chance" agreements or "final warnings" given to an employee.

Longo conceded that this "amnesty" policy was in effect when she terminated Crofford and asserts that she considered it in her decision. According to Longo, she believed that she was in compliance with the policy because in her view in Respondent's progressive disciplinary policy, the three-day suspension is the last discipline prior to discharge. Thus, she viewed the three-day suspension received by Crofford in November 2008 to be equivalent to a final warning.

Once again, as I found above with respect to Longo's interpretation of the final warning that she issued to Goines, I find here Longo's interpretation of Flores' memo to be strained and unconvincing. I note in this connection that Longo herself issued a final warning to Goines in January 2009, where she as would be expected, specifically warned Goines that further similar misconduct within 90 days would result in discharge. Interestingly, Crofford's suspension took place in November, which is more than 90 days from Crofford's discharge. Thus, if Longo viewed Crofford's suspension notice as the equivalent of a final warning, why did she not consider it as lasting only for 90 days as in the case of Goines. Longo furnished no testimony on that issue.

Further, as mentioned above, Longo herself issued a "final warning" to Goines in January, where she specifically detailed that it was a "final warning." Thus, Longo's view that the suspension issued by Rosson in November 2008, which did not include such language, should nonetheless be presumed to be the equivalent of a final warning is not persuasive.

Notwithstanding my conclusions above, I cannot find as argued by General Counsel that the discharge decision of Respondent was pretextual. As I observed in my discussion of Goines' discharge, I am not an arbitrator. If so, I would find in agreement with General Counsel that Longo misinterpreted the "amnesty" policy (assuming that the policy was included in a contract) and that the discharge was violative of the agreement. However, since it is not in my power to act as an arbitrator, I can only decide if in fact Longo believed that her interpretation was correct and acted on that belief. I am persuaded that Longo did believe that the "amnesty" policy was not applicable for the reasons that she cited and that this position is not frivolous.

As I also observed above in connection with Goines' termination, absent a finding of a connection to union activity, it is not the function of the Board to question the fairness of management's decisions or their interpretations of actions of their employees. *Consolidated Biscuit*, supra, 346 NLRB at 1180 (judge erred by substituting his own subjective standard of insubordination).

Accordingly, I cannot and do not find as argued by General Counsel that Respondent's decision to discharge Crofford was pretextual. The Board's theory of pretext was affirmed and explicated in the oft cited Court of Appeals decision of *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). There, the Court observed that if the trier of fact "finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal – an unlawful motive." 362 F.2d at 470. However, a finding that a reason for discharge is false is not the same as a finding that the respondent was wrong in its interpretation of the facts underlying the decision. A finding of pretext means that the reasons advanced by the employer did not exist or were not in fact relied upon, thereby leaving the inference of unlawful motivation. *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Limestone Apparel*, 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982).

Here, I cannot and do not find that the reasons advanced by Respondent for the discharge did not exist or were not in fact relied on. On the contrary, in my view, the evidence established that Crofford received several written warnings as well as a three-day suspension, which in part was related to customer service problems although not precisely the same kind of conduct involved in the final incident. Further, Respondent had received a number of complaints from the RTC about the conduct of the CSRs in dealing with customers, including a letter dated April 9, less than a week prior to Crofford's discharge. Thus, Longo, who as I detailed above in my discussion of Goines' termination, was intent on "straightening out" the CSRs when she started supervising these employees, was even more motivated to do so after the April 9 letter of complaint from the RTC.

I find that as in the Goines' discharge, Longo was an "overzealous" supervisor with no HR training, who was so engrossed in improving the performance of the CSRs to meet the standards set by the RTC, that she stretched her interpretation of Respondent's amnesty memo to permit her to terminate Crofford.

Therefore, I find contrary to General Counsel that Longo did in fact rely on Crofford's performance during the Quabner call, that she viewed it as unacceptable and that she also relied on Crofford's past record in making her recommendation to discharge Crofford.

I also rely upon, in such a conclusion, the letter from the RTC dated June 12. While this letter was well after the discharge decision and was not relied on by Respondent in its decision to discharge, in my view it is relevant to an evaluation of the pretext issue. While the letter was issued shortly after the complaint was issued, and in all probability was issued in response to the RTC being informed that Crofford through the Board was seeking reinstatement, it nonetheless has a bearing on issues before me. It demonstrated that the RTC agreed with Longo's assessment that Crofford's performance during the April 3 was inadequate[38], and further stated that as a result instructed Respondent to remove Crofford from contact with RTC customers.

Having found that Respondent's decision to terminate Crofford was not pretextual, there is very little left to General Counsel's prima facie case. It has not established that Respondent was aware of whether Crofford signed a union authorization card or otherwise supported the

[38] The letter characterized Crofford's performance as "unprofessional, lacking in sensitivity to the customer's obvious distress and not in accordance with RTC training guidelines for inquiry requests."

Union, the evidence of animus is minimal and the timing coincided with the incident precipitating the discharge as well as the letter of complaint from the RTC about the performance of the CSRs. Further, I have also considered Respondent's Freedom of Association policy, which it abided by in the union election process by not campaigning against the Union. In these circumstances, I conclude that the General Counsel has failed to establish that the union activity of Crofford was a motivating factor in Respondent's decision to discharge Crofford.

I shall therefore recommend dismissal of this allegation in the complaint.[39]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees concerning their protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

4. Respondent has not violated the Act in any other manner alleged in the complaint.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

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[39] As in the case of Goines, my view is that it might not be a bad idea for Respondent to make some accommodation with Crofford. Respondent, as with Goines, allowed an "overzealous" supervisor with no HR training to terminate an employee in apparent violation of Respondent's "amnesty" policy. In this connection, I note that Flores, who issued the memo announcing the policy and who signed off on the discharge decision, can also be faulted. Flores did not testify about the issue of the "amnesty" policy nor about her conversation with Longo wherein Flores approved the discharge recommendation. Since the issue was not discussed during the conversation between Longo and Flores, we do not know if Flores agreed with Longo's interpretation of the policy or that she simply overlooked the problem. Either way, Flores, who presumably had HR training, did not appear to evidence any sophistication in HR principles, by approving the discharge without further review. I emphasize again that my suggestion that Respondent make some accommodation with Crofford is only that and is not a binding recommendation, which I cannot make in view of my finding that Respondent has not violated the Act.

Nonetheless, I believe that some sort of an accommodation with Crofford would be appropriate and might foster better relations with the Union, which had just been certified to represent the CSRs.

I recognize that reinstatement of Crofford to her former position is not viable in view of the position of the RTC. However, it is conceivable that Respondent could find another position for her or perhaps a CSR position at another location.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[40]

ORDER

The Respondent, First Transit Inc., North Las Vegas, Nevada, its officers, agents, successors and assigns shall

1. Cease and desist from

a. Coercively interrogating its employees concerning their protected concerted activities.

b. In any like or related manner interfering with restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days after service by the Region, post at its facilities located in North Las Vegas, Nevada copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 30, 2009.

b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. , February 23, 2010.

_____
Steven Fish
Administrative Law Judge

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate our employees concerning their protected concerted activities.

WE WILL NOT in any like to related manner interfere with restrain or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

FIRST TRANSIT INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, AZ 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.